Supreme Court, U. S.
FILED
JUL 24 1979
MICHAEL RODAK, JR., CLERK

No. 79-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS,

Petitioner,

v.

WASHINGTON GAS LIGHT COMPANY

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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HALLEY I. THOMAS,

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v.

WASHINGTON GAS LIGHT COMPANY

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The claimant, Halley I. Thomas, petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fourth Circuit, (App. A., *infra*), is unreported. The final decision of the Benefits Review Board, (App. B., *infra*), is reported at 9 BRBS 760 (1978). The initial decision

of the Benefits Review Board, (App. D. *infra*), and the decisions of the Administrative Law Judge, (App. C., E., & F., *infra*), are also unreported.

JURISDICTION

The decision of the Court of Appeals was made and entered on April 27, 1979. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(i).

QUESTION PRESENTED

Whether the constitutional obligation to give full faith and credit to the Virginia Workmen's Compensation Act, including its exclusive remedy provision, Va. Code § 65.1-40 (1975 Repl. Vol.), precluded an award of compensation benefits by the District of Columbia following approval by the Industrial Commission of Virginia of a voluntary workmen's compensation agreement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, § 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and, judicial Proceedings of every other State.

The Virginia Workmen's Compensation Act is embodied in Title 65.1 of the Virginia Code. VA. Code, § 65.1-40 (1975 Repl. Vol.), states:

> §65.1-40. Employee's rights under Act exclude all others. — The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of

> such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (Code 1950, § 65-37, 1968, c. 660)

Va. Code, § 65.1-61 (1975 Repl. Vol.) declares:

> § 65.1-61. Foreign injuries. — When an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if:
>
> (1) The contract of employment was made in this State;
>
> (2) The employer's place of business is in this State; and
>
> (3) The residence of the employee is in this State;
>
> Provided the contract of employment was not expressly for service exclusively outside of the State.
>
> But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act. (Code 1950, 65-58, 1968, c.660.)

STATEMENT OF THE CASE

Halley I. Thomas, a resident of the District of Columbia since 1949, was hired in 1970 as a heavy laborer by the Washington Gas Light Company (WGL) at their employment office in Washington, D.C. WGL's home office is also located in the District of Columbia. Although Mr. Thomas occasionally worked in the neighboring jurisdic-

tions of Virginia and Maryland, approximately 60% of his duties were performed in the District. For his endeavors, Mr. Thomas received a pay check drawn upon a District of Columbia bank.

On January 22, 1971, Mr. Thomas was breaking concrete with an air hammer in Arlington, Virginia when he sustained a disabling injury to his back. Since that date, Mr. Thomas has been unable to return to his occupation.

Prior to his being represented by counsel, Mr. Thomas agreed to accept temporary total disability benefits under the Virginia Workmen's Compensation Act on February 5, 1971, fourteen days after his injury. The Industrial Commission of Virginia subsequently approved the agreement on March 15, 1971. Mr. Thomas received the Virginia benefits until they reached the maximum amount payable under Virginia law. Mr. Thomas is currently without any compensation disability payment and medical coverage.

On September 24, 1974, Mr. Thomas notified the Deputy Commissioner of the Office of Workers' Compensation Programs (OWCP) of his intention to seek compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, as adopted by the District of Columbia to serve as the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501-2. Mr. Thomas' claim was initially referred to Administrative Law Judge David Pelkey. Judge Pelkey ruled that the U.S. Constitution's Full Faith and Credit Clause did not make the Virginia benefits *res judicata* to the extent that they barred a claim under the District of Columbia Act. (App. F. p. 44). Subsequently, in a Final Decision and Order dated March 4, 1976, Judge Pelkey awarded Mr. Thomas benefits for permanent total disability beginning as of the date of injury. (App. E., p. 31). WGL's appeal to the Benefits Review Board, U.S. Department of Labor, resulted in a remand for the pur-

pose of taking additional evidence. (App. D., p. 18). After an additional hearing, Judge Pelkey issued a Supplemental Decision and Order on January 21, 1977, reiterating his view that the Full Faith and Credit Clause did not preclude the subsequent award and upholding the permanent total disability benefits. (App. C., p. 13). WGL again appealed to the Board which unanimously affirmed the Administrative Law Judge. (App. B., p. 8).

WGL sought review before the United States Court of Appeals for the Fourth Circuit. On April 27, 1979, in an unpublished per curiam opinion, the Fourth Circuit reversed without argument on the strength of *Pettus v. American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), petition for writ of certiorari pending, No. 78-1739, filed May 18, 1979. (App. A., p. 2).

REASONS FOR GRANTING THE PETITION

Disposition of the present controversy is dependent upon resolution of difficult questions respecting constitutional doctrine, conflict of laws, and principles of *res judicata*. Specifically, this Court is requested to define under what circumstances an employee may receive workmen's compensation benefits from more than one jurisdiction for a single injury without violating constitutional principles of full faith and credit. The establishment and refining of such guidelines requires reconciliation of overlapping statutory provisions of neighboring jurisdictions. Thus, the resolution of the present controversy will shed light on many future questions of state sovereignty within the federal system.

I.

THE FAILURE OF THE FOURTH CIRCUIT TO FAITHFULLY ADHERE TO THE DIRECTIVES ESTABLISHED BY THIS COURT IN *INDUSTRIAL COMMISSION OF WISCONSIN v. McCARTIN*, 330 U.S. 622 (1947), CONSTITUTES COMPELLING JUSTIFICATION FOR GRANTING THE PETITION.

The Lower Court's summary reversal in the instant case was predicated upon the conclusion that Mr. Thomas' claim involved an "identical factual premise and corresponding questions of law" as were posed in *Pettus v. American Airlines*, 587 F.2d 627 (4th Cir. 1978), petition for writ of certiorari, No. 78-1739, filed May 18, 1979. The Fourth Circuit had determined that recovery by the employee, George Pettus, of compensation benefits pursuant to an award by the Industrial Commission of Virginia barred recovery of benefits from the District of Columbia. The majority held that the effect to be accorded the Virginia exclusive remedy provision, a provision similar to that contained in most other state acts, was dictated by *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, (1943). There, this Court reviewed the claim of an oil field worker who received a compensation award in Louisiana after having previously received compensation from the State of Texas. The employee appeared *pro se* to defend against the employer's contention that the Full Faith and Credit Clause made the Texas award exclusive of any extrajurisdictional recovery. In a 5-4 decision, this Court concluded that the Texas exclusive remedy provision foreclosed any claim under the Louisiana statute.

While relying on *Magnolia*, the Fourth Circuit dismissed the relevance of *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947). In *McCartin*, an employee residing in Illinois was injured while working in Wisconsin. The employee and his employer reached an agreement providing for compensation to be paid under the Illinois statute and in settlement of all claims thereunder. Subsequently, the workman filed a claim for compensation benefits in Wisconsin. The employer defended against the second award by arguing that, according to the rule in *Magnolia*, the Illinois provision making workmen's compensation the employee's exclusive remedy barred the Wisconsin award. However, the unanimous panel concluded that the Illinois benefits were final and conclusive only within that jurisdiction and were not intended to inhibit extrajurisdictional remedies. The Court announced the rule by which all future controversies were to be measured and judged when it stated:

> ". . . there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment [citations omitted]. And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted (citations omitted), we should not readily interpret such a statute to cut off an employee's right to sue under other legislation passed for his benefit. *Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction.*" 330 U.S. at 627-8.

The decision below mischaracterizes and violates this Court's previous decisions in *Magnolia* and *McCartin* in four critical respects. The first two concern the nature and effect of the award itself while the latter two concern the construction given the Virginia statute. This Court should grant the petition in order to rectify this unfortunate decision and define clearly the guidelines for resolving this constitutional question.

The initial aspect which sets the present case apart from both *Pettus* and *Magnolia* is the means by which the

benefits were secured. In *Pettus* and *Magnolia,* the original compensation was paid pursuant to a compensation award. The amount and duration of the benefits were determined subsequent to the filing of a claim and an adjudicatory hearing. In contrast, Mr. Thomas' right to compensation was settled by a voluntary agreement only subsequently rubber stamped by the Industrial Commission of Virginia.

In such a case, the compulsion to give full faith and credit to the "award" is considerably weakened. The nature and effect of a voluntary agreement entered into by private parties is undoubtedly less final and conclusive than an award issued pursuant to an adversarial proceeding. *Industrial Track Builders of America v. Lemaster,* 429 S.W.2d 403 (Ky. 1968); *Texas Employers' Insurance Association v. Miller,* 370 S.W.2d 12 (Tex. Civ. App. 1963); *Della Vecchia v. World Scope Publishing Company,* 64 N.J. Super 333, 165 A.2d 872 (1960). As Professor Arthur Larson, the preeminent authority in compensation law, surmises in his treatise, *The Law of Workmen's Compensation,* Vol. 4, § 85.50 (1979):

> "Several cases, both before and after *McCartin,* have held that a prior voluntary payment of compensation accepted by the employee under the laws of one state does not detract from the employee's statutory right to an award in another state whether the agreement for compensation received commission approval or not."

Although the Fourth Circuit failed to discern the unique nature and quality of the award, this Court has itself recognized the importance of the means used to secure the benefits. In *McCartin,* the Illinois benefits were the result of an almost identical voluntary agreement approved by the Illinois Industrial Commission. The Court therefore held that:

> ". . . . since the Texas award had the degree of finality contemplated by the full faith and credit clause, it was held that Louisiana was constitutionally forbidden from entering a subsequent award under its statute. But we do not believe that the same situation exists in this case, the Illinois award being different in its nature and effect from the Texas award in the *Magnolia* case." 330 U.S. at 621-2.

Again, in *Carroll v. Lanza,* 349 U.S. 408 (1955), the issue arose when an employee pursued a claim under the Arkansas Compensation Act after receiving 34 weekly payments under the Missouri law. The Missouri exclusive remedy provision was indistinguishable from the Virginia statute in that it excluded "all other rights and remedies . . . *at common law or otherwise.*" 349 U.S. at 409. The benefits under the Missouri Compensation Act had been paid voluntarily by the employer. Mr. Justice Douglas wrote for the Court:

> "The Court of Appeals thought *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, to be controlling. There the employee received a *final award* for compensation in the forum of the injury returned to his home State and sued to recover under its Compensation Act. We held that the latter suit was precluded by the Full Faith and Credit Clause. But here there was no final award under the Missouri Act. Under that Act the statutory payments apparently start automatically on receipt of notice of the injury [citation omitted]. While provision is made for an adjudication of disputes between an employee and his employer [citation omitted], no adjudication was sought or obtained here." 349 U.S. at 410-11. (Emphasis supplied by the Court).

The second major element of the present case which militates against the application of *Magnolia* is the indefinite nature of the Virignia award itself. Mr. Thomas only received Virginia Compensation benefits for *temporary* total disability. Thus, the Virginia Industrial Commission retained continuing jurisdiction over the claim to either award permanent disability benefits or to finally dispose of the case. Therefore at the time the claim was filed in the District of Columbia, there had been no final and conclusive disposition of Mr. Thomas' claim. Mr. Thomas was subsequently awarded permanent total disability benefits by the District of Columbia. In his Interlocutory Decision and Order the Administrative Law Judge adopted the rule of *Spietz v. Industrial Commission*, 251 Wis. 168, 28 N.W.2d 354 (1947), holding that the requisite finality is not established by an award for temporary disability. The Petitioner urges that this Court consider the question ignored by the Fourth Circuit, i.e. whether an agreement for indefinite temporary disability benefits precludes an award in another jurisdiction for permanent and total disability.

Thirdly, the Fourth Circuit has misapplied the *Magnolia-McCartin* precedent in its analysis of the language and intent of the Virginia exclusive remedy provision. The Virginia Workmen's Compensation Act does not contain the "unmistakable language" expressly prohibiting supplementation of a Virginia award by another jurisdiction as required by *McCartin*. The Virginia exclusive remedy provision, Va. Code § 65.1-40, states that "the rights and remedies herein granted . . . shall exclude all other rights and remedies of such employee . . . *at common law or otherwise* . . ." The provision strikingly parallels the Illinois statute of *McCartin* which provided that "No *common law or statutory right* . . . other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act . . ." 330 U.S. at 627. The *McCartin* decision held that the

clear object of this common provision is merely to substitute the right to compensation for any remedial steps against an employer which the jurisdiction previously recognized. Thus, in the absence of an express provision to the contrary, the sole effect of the section is to exclude any alternative remedies *within that jurisdiction*.

Fourth and finally, the Lower Court has extended the scope of the *Magnolia* decision far beyond its well defined limits. The Texas Act was unusual in that it had been judicially construed to provide that "a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state." 330 U.S. at 435. Obviously, this was not the problem before the Court, but its reverse. The Court, however, inductively reasoned that the Texas legislature must have also intended through its exclusive remedy provision for an award in Texas to prevent a subsequent award elsewhere. However, the majority expressly limited the scope of its decision to this peculiar situation. Mr. Chief Justice Stone stated unequivocally: "We have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas . . ." 320 U.S. at 443.

The Virginia statute presents the exact question upon which the *Magnolia* majority reserved judgment. Virginia specifically provides that compensation *may* be granted under the Virginia Act despite a prior award by another jurisdiction. Va. Code § 65.1-61 (1975 Repl. Vol.). Ultimately then, the Fourth Circuit, has by their own initiative, extended *Magnolia* in a manner expressly forbidden by the majority opinion. Moreover, application of the *Magnolia* rationale to the instant controversy is as supportive of the second award as *McCartin*. The exact chain of reasoning central to this Court's decision in

Magnolia that a successive award was *precluded* by the Texas Act, compels the conclusion that a second award is *permitted* by the Virginia Act. Therefore, the preservation of this Court's mandates in both *Magnolia* and *McCartin* requires a result contrary to the Fourth Circuit's decision.

II.

THE CONFUSION AND CONFLICT AMONG THE STATES AND JUDICIAL CIRCUITS CREATED BY THE DECISION BELOW CONSTITUTES COMPELLING JUSTIFICATION FOR GRANTING THE PETITION.

The decision below is in direct conflict with the overwhelming weight of authority. Although *McCartin* did not expressly override *Magnolia,* it has been widely interpreted as sanctioning a successive award in the absence of an express statutory prohibition to the contrary. A Larson, *The Law Of Workmen's Compensation,* Vol 4, § 85.40 (1970). In view of the number of states whose compensation statutes lack such an express prohibition, the decision pre-empts the applicability of *Magnolia* in nearly every jurisdiction.[1] Not surprisingly, the Fourth Circuit's construction of *Magnolia* and *McCartin* is in express conflict with the position of most state courts. *Jordan v. Industrial Commission,* 117 Ariz. 215, 571 P.2d 712 (1977);

[1]Prof. Larson notes in his treatise that in light of the lack of such an express prohibition in Texas, the *Magnolia* doctrine may not even apply to the statute it originally governed. A. Larson, *The Law of Workmen's Compensation,* Vol. 4, § 85.30 (1979). See *Griffin v. Universal Underwriters Ins. Co.,* 283 So.2d 748 (La. 1973), *cert. denied,* 416 U.S. 904 (1974).

Stanley v. Hinchcliffe and Kenner, 395 Mich. 645, 238 N.W. 2d 13 (1976); *Ryder v. Insurance Company of North America,* 282 So.2d 771 (La. App. 1973); *Wood v. Aetna Casualty & Surety Company,* 260 Md. 651, 273 A.2d 125 (1971); *Industrial Track Builders of America v. Lemaster,* 429 S.W.2d 403 (Ky. 1968); *Harrison Company v. Norton,* 244 Miss. 752, 146 So.2d 327 (1962); *Cook v. Minneapolis Bridge Construction Co.,* 231 Minn. 433, 43 N.W.2d 792 (1950). See also *Restatement of Conflict of Laws,* § 403 (1934); *Restatement (Second) of Conflict of Laws,* § 182 (1971).

More importantly, the Fourth Circuit's decision reflects a construction of this Court's rulings directly at odds with other judicial circuits. In *Director, Office of Workers' Compensation Programs v. Boughman,* 545 F.2d 210 (D.C. Cir. 1976), the District of Columbia Circuit upheld an award under the D.C. Act subsequent to a similar award in California. The Court summarily rejected the view that the Full Faith and Credit Clause was any barrier to the second award. The unanimous panel embraced the interpretation of *McCartin* adopted by the Benefits Review Board, a statutorily created administrative appellate tribunal. The Board, in its disposition of the *Boughman* case had stated that "[i]n situations where the workmen's compensation law of a state does not contain an explicit prohibition against seeking additional or alternative relief under the laws of another jurisdiction, the Supreme Court has sanctioned the granting of successive awards, subject to crediting the liable party with amounts paid pursuant to the initial award." *Ekar v. Int'l Union of Operating Engineers,* 1 BRBS 406, at 419 (1975). Since the California and Virginia statutes have similar provisions, the diverse applications of the *Magnolia-McCartin* precedent can only foster chaos in the future.[2]

[2]Curiously, the Fourth Circuit did not mention *Boughman* in its *Pettus* decision. The majority instead relied on *Gasch v. Britton,* 202

The decision below is also contrary to the position taken by the Tenth Circuit in *Sade v. Northern Natural Gas Co.*, 458 F.2d 210 (10th Cir. 1972). A central issue before the Court was whether the plaintiff's recovery under the Oklahoma Workmen's Compensation Law barred a common law action in Kansas. The Oklahoma Act, like the Texas Act in *Magnolia*, provided that a previous recovery from another jurisdiction precluded an award in Oklahoma. Nonetheless, the Tenth Circuit's interpretation of *McCartin* was summarized by the statement that:

> "There is no provision in the Oklahoma law, however, which specifically purports to preclude one who has recovered under Oklahoma law from thereafter pursuing any additional remedies he may have under the laws of the state where the injury occurred. Moreover, under *Industrial Commission v. McCartin*, [citation omitted] such could be accomplished only by "unmistakeable language", which language is not to be found in Oklahoma law." 458 F.2d at 215.

The decisions in *Pettus* and the instant case are also in conflict with the Fourth Circuit's own decision in *Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs*, 583 F.2d 1273 (4th Cir. 1978). Although the majority in Pettus attempted to distinguish the case by noting that the Virginia Commission did not have jurisdiction in *Newport News*,

F.2d 356 (D.C. Cir. 1953) which held that the Maryland exclusive remedy provision precluded a subsequent award in the District of Columbia. However, the case is of extremely questionable precedential authority. The *Gasch* decision was predicated entirely upon implying from a Maryland Court of Appeals decision that the statute's exclusive remedy section was an express prohibition of successive awards. Subsequently, in *Wood v. Aetna Casualty Company*, 260 Md. 651, 273 A.2d 125 (1971), the Maryland Court of Appeals denied any intention to so hold and therefore upheld the right of a claimant to obtain an extrajurisdictional award subsequent to a Maryland award.

the distinction, even if valid, does not reconcile the statement by the Court that:

> "[E]ven assuming that under the reasoning of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), the adjudication of a state compensation claim could in some circumstances bar later proceedings under the Federal Act, it is obvious, especially from our discussion of the "exclusivity" provision of the Virginia statute, that the reasoning of *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), not *Magnolia*, is controlling in this case and that no valid 'full faith and credit' issue is raised by the federal award." 583 F.2d at 1278.

In assessing the consequences of this confusion, it should be noted that the context in which this issue has arisen is not an isolated one. It is not uncommon for a multiplicity of states to possess jurisdiction to award compensation for a single injury. For example, due to the geographical proximity of three jurisdictions in the Washington, D.C. Metropolitan Area, workmen in that area often pursue compensation claims in more than one jurisdiction.[3] Nor is the impact limited to select localized areas. Employment injuries which are potentially compensable under more than one statute are surprisingly commonplace. As Professor Larson observes:

> "Tangles of this sort, which almost sound as if they had been invented for an examination ques-

[3]Due to the regularity with which District of Columbia employees are injured outside the District of Columbia, many local unions have negotiated "excess benefits" provisions in their collective bargaining agreements which require the employer to pay the injured workman the difference between the benefits provided by the jurisdiction in *which the injury occurred and the higher D.C. benefits. See Sharp v. Liberty Mutual Ins. Co.*, 463 F.Supp. 104 (D. Md. 1978); *Cox v. American Store Corp.*, 283 F.Supp. 390 (D.Md. 1968).

tion in *Conflict of Laws,* are by no means unusual, what with truck, bus and airlines, construction companies, and many other industries operating on a nationwide or even worldwide basis, drawing their employees from many states, contracting with them at the home office or at branch headquarters, and sending them to work in different states and countries, often after trying to contrive a private contract that will ensure the applicability of a single named compensation act." A. Larson, *The Law of Workmen's Compensation,* Vol 4, § 85.10 (1979).

CONCLUSION

The instant case provides an opportunity to answer nagging constitutional questions which have surfaced and resurfaced since the *McCartin* decision in 1947. Initially, the disposition of the case at bar will substantially define the degree of finality in nature and effect required of compensation awards for purposes of the Full Faith and Credit Clause. Moreover, the decision will ultimately remove the lingering *Magnolia-McCartin* controversy, revived by the decision below, respecting the proper construction of compensation act exclusivity provisions. The Petitioner urges, that in resolving these issues, the Fourth Circuit overextended the scope of *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943) and inadvertently wandered from the clear directions provided by *Industrial Commission of Wisconsin v. McCartin,* 330 U.S. 622 (1947). In order to restore and preserve the vitality of this Court's mandates and to quiet the confusion engendered by the decision below, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1261

WASHINGTON GAS LIGHT COMPANY,
Self-Insured Employer,
Petitioner,

v.

HALLEY I. THOMAS,
Respondent.

Submitted January 18, 1979 — Decided April 27, 1979

On Petition for Review of an Order of the
Benefits Review Board of the United States
Department of Labor

Before BRYAN, Senior Circuit Judge,
WIDENER and HALL, Circuit Judges.

Lewis Carroll, Carl W. Belcher, Douglas V. Pope,
on brief for Petitioner; Lee C. Ashcraft,
Joseph H. Koonz, Jr., James A. Mannino,
James F. Green, on brief for Respondent.

PER CURIAM:

This is a petition by the Washington Gas Light Company (WGLC) to review an order of the Benefits Review Board (BRB) of the United States Department of Labor, awarding Halley I. Thomas compensation benefits in 1974, under the Longshoremen's and Harbor Workers Act, 33 U.S.C. § 902 *et. seq.* (1970 & 1978), as made applicable to the District of Columbia, D.C. Code Ann. § 36-501 (1973 & Supp. IV 1977), after he had sought and obtained an award from the Industrial Commission of Virginia in 1971, under the State's Compensation Act, Va. Code § 65.1-1 *et seq.* (1973 Repl. Vol.). WGLC appeals, moving for a final judgment of reversal, and we grant the motion.

Upon an identical factual premise and corresponding questions of law, we set aside a similar order of the BRB in Pettus v. American Airlines, Inc., 587 F2d 627 (4th Cir. 1978). Consequently, we perceive no reason to hear argument on the appeal.

Reversed.

APPENDIX B

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

HALLEY I. THOMAS	)	
Claimant-Respondent	)	
v.	)	Benefits Review Board
WASHINGTON GAS LIGHT COMPANY	)	BRB No. 77-182
Self - Insured Employer	)	DECISION
Petitioner	)	

Appeal from the Decision and Order and Supplemental Decision and Order of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Carl W. Belcher, Washington, D.C., for the self-insured employer.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

This is an appeal by the employer from a Decision and Order and Supplemental Decision and Order (76-DCWC-4) of Administrative Law Judge David W.

Pelkey, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §*501 et seq.* (hereinafter referred to as the Act).

On January 22, 1971, the claimant, Halley I. Thomas, was injured in the course of his employment in Arlington, Virginia. Pursuant to an agreement entered into by the parties and approved by the Virginia Industrial Commission, claimant has been receiving temporary total disability benefits from the date of injury except for the brief period between December 27, 1971, and January 3, 1972, when he performed clerical work for the employer.

Claimant notified the deputy commissioner of his intention to pursue a claim for benefits pursuant to the District of Columbia Workmen's Compensation Act on September 24, 1974.

In a preliminary hearing before Administrative Law Judge Pelkey, the employer acknowledged that, but for the Virginia award, the claim would be cognizable under District law. He argued, however, that the Virginia award was res judicata and that a subsequent award under District law would violate the Full Faith and Credit Clause of the United States Constitution. U.S. Const. Art. 4, § 1. The administrative law judge rejected this argument and in an Interlocutory Decision and Order dated September 24, 1975, concluded that the claim was within the jurisdiction of the District of Columbia. Subsequently, in a final Decision and Order, the administrative law judge awarded claimant benefits for permanent total disability from January 22, 1971, an additional ten percent compensation under Section 14(e) of the Act, 33 U.S.C. § 914(e), interest, and an attorney's fee.

Both the claimant and the employer appealed. The employer contended that the Virginia award was entitled to full faith and credit in the District of Columbia;

that Mr. Thomas' claim under the Act was time-barred; and that the imposition of the Section 14(e) "penalty" was not in accordance with law. Claimant contended the amount of the attorney's fee awarded was inadequate.

Following oral argument, the Board granted a motion by the employer to remand the case for the admission and consideration of certain documents bearing on the issues of timeliness and an assessment under Section 14(e). *Thomas v. Washington Gas Light Co.*, ____ BRBS BRB No. 76-180 & 76-180A (Oct. 20, 1976).

In a hearing pursuant to the remand, the administrative law judge determined that the claim was timely filed and computed the amount of additional compensation owing under Section 14(e) of the Act.

The employer appeals raising the same three issues previously before the Board. It also contends that the ad ministrative law judge erroneously failed to consider Section 12 of the Act.

As a preliminary matter, the claimant argues that since the Board's previous decision to remand did not direct consideration of whether the Virginia award is entitled to full faith and credit, the employer is foreclosed from raising this issue in the present appeal. We find claimant's argument is without merit. The Board remanded the case to "complete the record" since, as we pointed out, "the unsatisfactory state of the record . . . precludes the thorough consideration of the issues on appeal which the parties deserve." The record is now complete and we accordingly proceed to consider the merits of the issues raised.

Employer contends that the agreement approved by the Virginia Industrial Commission is the claimant's exclusive remedy under Virginia law and that this agreement is therefore entitled to full faith and credit in the District of Columbia.

In situations where the workmen's compensation law of a state does not contain an explicit prohibition against seeking additional or alternative relief under the laws of

another jurisdiction, the Supreme Court has sanctioned the granting of successive awards, subject to crediting the liable party with amounts paid pursuant to the initial award. *Industrial Commission of Wisconsin v. McCartin,* 330 U.S. 622 (1947); *see also Director, Office of Workers' Compensation Programs v. Boughman,* 545 F.2d 210 (D.C. Cir. 1976). Each state is prima facie entitled to enforce in its own courts its own lawfully enacted Statutes. *Alaska Meatpackers Association v. Industrial Accident Commission of California,* 294 U.S. 532 (1934) In *Pettus v. American Airlines, Inc.,* 6 BRBS 461, BRB No. 77-115 (Aug. 22, 1977), we specifically held that the Virginia statue contains no explicit prohibition which would preclude recovery injuries under the District of Columbia Act. We therefore conclude that it is proper for the District of Columbia to exercise its concurrent jurisdiction in this case.

The employer also contends that Mr. Thomas' claim is time-barred under Section 13(a) of the Act, 33 U.S.C. §913(a), because his claim was not filed until three years after his injury.

Section 30(f) of the Act, 33 U.S.C. § 930(f), tolls the running of the Section 13(a) statute of limitations when the employer having notice or knowledge of the employee's injury fails to file a report as required by Section 30(a) of the act. 33 U.S.C. §930(a). Although the employer does not dispute that it had knowledge of the injury and that it has not yet filed the report required by Section 30(a), it argues that a similar report was filed in Virginia which should be construed as compliance with the Act.

We cannot accept this argument. Regardless of whether the requirements under the Virginia Act are similar to those under the District of Columbia Act, the Board has consistently held that the statute of limitations is tolled by Section 30(f) unless the employer complies with Section 30(a). *Riley v. Eureka Van and Storage Co.,* 1 BRBS 449, BRB No. 74-155 (May 6, 1975). Since no report of injury jury was ever filed under the ACT, we conclude that the

statute of limitations did not begin to run against Mr. Thomas' claim and it is not time-barred.

The employer also contends that it was error for the administrative law judge to assess additional compensation under Section 14(e) of the Act, 33 U.S.C. § 914(e) since the employer made compensation payments pursuant to Virginia law and these payments should be considered full satisfaction for any compensation owed until a claim is filed under the District of Columbia Act. It further argues that the issues it raised in conennection with the employee's claim constitute sufficient compliance with the requirements of Section 14(d) and should operate as a notice of controversion for the period after the filing of the District of Columbia claim.

In *Jones v. Newport News Shipbuilding & Dry Dock Co.,* 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977) we held that

> Section 14(e) provides for only two exceptions to the requirement of the additional ten percent award: The timely filing of the Notice of Controversion pursuant to Section 14(d) or excuse for nonpayment of compenstion "owing to conditions over which [the employer] had no control."

Jones, supra at 131. Neither the compensation benefits paid pursuant to Virginia law nor issues raised by the employer in connection with the employee's claim are tantamount to filing a Notice of Controversion under Section 14(e) of the Act. Further, the administrative law judge determined that there had been no showing by the employer that, owing to conditions over which he had no control, compensation payments could not have been made. The record clearly supports this conclusion. Since the employer has not brought his case within either of the two exceptions to Section 14(e) set forth in *Jones supra,* we conclude that the award of additional compensation is proper.

The employer's last contention is that it was error for the administrative law judge to fail to consider the ap-

plicability of Section 12 of the Act. 33 U.S.C. § 912. It is argued that the transcript of the August 7, 1975, hearing, the first hearing held before the administrative law judge, shows that the notice requirement under Section 12 was raised as an aspect of the employer's jurisdictional issue. However, it was stipulated at the August 1975 hearing that the only issues in dispute were jurisdiction, nature and extent of disability, whether or not a ten percent penalty, interest and costs should be assessed, and whether the claim was timely. At the end of the hearing, employer did note that it would "submit a brief memorandum of law on the question of jurisdiction, as well as, notice, ten percent penalty. . ." However, this ambiguous statement was not enough to indicate the question of notice under Section 12 was being raised. Moreover, employer did not even mention the notice issue in its post-hearing brief. We can find nothing in the record to indicate that the parties ever changed the issues originally stipulated to include Section 12. In fact, the first and only specific reference to Section 12 is in the employer's brief to the Board in the present appeal. We conclude that Section 12 was not raised before the administrative law judge at the initial or any other stage of the claim and cannot now be raised for the first time on appeal. *Miller* v. *Tacoma Boatbuilding Co.*, _____ BRBS_____ , BRB No. 77-121. (Jan. 23, 1978).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

JULIUS MILLER, Member

I Concur: SAMUEL J. SMITH, Chairman

Dated this 28th day of February, 1978

APPENDIX C

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	)	
HALLEY I. THOMAS	)	
Claimant	)	
v.	)	
	)	Case No. 76-DCWC-4
WASHINGTON GAS LIGHT COMPANY	)	OWCP No. 40-89630
Employer	)	
SELF-INSURED	)	
Carrier	)	

SUPPLEMENTAL DECISION AND ORDER

In an October 20, 1976, Decision (BRB No. 76-180, 180A), the Benefits Review Board, attending appeals from this administrative law judge's decisions in a September 24, 1975, Interlocutory Decision and a March 4, 1976, Decision and Order (D&O), remanded this matter with directions to the administrative law judge:

> "xxxx to allow the admission and consideration of relevant documents included in the deputy commissioner's file bearing on the issues of the

claim's timeliness and the Section 30 notice requirement under the Act, 33 U.S.C. § 930, and the assessment of additional compensation pursuant to Section 14(e)."

The March 4 D&O awarded Claimant compensation for permanent total disability in connection with a claim therefor under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.*

In compliance with the mandate of the Benefits Review Board, a hearing was held on January 10, 1977. Neither party tendered testimony at that hearing. However, at and prior to the time of the hearing, the parties introduced the following documents into evidence, representing that they were pertinent and material and stipulating that proper disposition was made of the documents within reasonable times after the dates they bear:

A) a February 5, 1971, memorandum of agreement as to payment of compensation under the Virginia workmen's compensation statute;

B) a March 15, 1971, Virginia Industrial Commission approval of the agreement and award of compensation;

C) a September 24, 1974, document constituting Claimant's claim for compensation under the District of Columbia Workmen's Compensation Act (the Act);

D) an October 2, 1974, notice, from the Department of Labor (DOL) to Employer, that Claimant had filed a claim for compensation under the Act;

E) a November 15, 1974 letter, from Employer to DOL, asserting, *inter alia,* that the claim "should be denied" because Claimant failed to file his claim under the Act within one year after the injury;

F) an April 9, 1975, letter from DOL to Employer that, *inter alia,* recommended that payments be made under the Act;

G) an April 14, 1975, letter in which Employer advised

DOL that its recommendation was rejected and in which Employer submitted that it would continue to pay compensation under the Virginia statute;

H) a May 19, 1975, form constituting another claim by Claimant for compensation under the Act, again for the January 1971 injury;

I) a May 22, 1975, notice, from DOL to Employer, that Claimant had filed a claim for compensation under the Act;

J) a June 10, 1975, letter, with which Employer transmitted its Answer, to the May 1975 claim, to DOL;

K) a June 10, 1975, form constituting Employer's Answer to the May 1975 claim;

L a July 11, 1975, memorandum by which the deputy commissioner referred the claim to Office of Administrative law Judges for a formal hearing; and

M) a January 7, 1977, letter by which DOL transmitted specified documents to Employer.

Pertinent provisions relating to whether the claim was filed in a timely manner and the Section 30 notice requirements are:

A) those in 33 U.S.C. 913(a) that state that, a right to compensation for disability shall be barred unless a claim therefor is filed within one year after the injury;

B) those in 33 U.S.C. 930(a) that state that, within 10 days after an injury, an employer shall send the Secretary of Labor and a deputy commissioner a report containing prescribed information relating to the injury; and

C) those in 33 U.S.C. 930(f) that state that, where an employer, specified agent or carrier has knowledge of an injury and fails, neglects or refuses to file the Sec. 30(a) report, the time limitation in Sec. 13(a) shall not begin to run against the claim, or in favor of the employer or carrier, until the Sec. 30(a) report is furnished.

Pertinent provisions relating to the assessment of additional compensation are those in 33 U.S.C. 914(e), relating to instances where payment of compensation installments is required where there has been no award of compensa-

tion . They prescribe that 10 percent thereof shall be added to each installment not paid within 14 days after it becomes due unless:

A) an employer files a prescribed notice, of controversion of the right to payment, with a deputy commissioner within 14 days after acquisition of knowledge of an alleged injury; or

B) a deputy commisioner (or, after referral to Office of Administrative Law Judges, and administrative law Judge) excuses such non-payment after an employer shows that, owing to conditions over which it had no control, the prescribed payment could not be made.

Findings of Fact

A) Claimant did not file his claim under the Act within one year after the injury.

B) Employer had knowledge of the injury on the day it was sustained by Claimant.

C) Employer did not, within 10 days after claimant's injury, file the report required by 33 U.S.C. 930(a) and yet has not filed the report.

D) Employer did not, on or before 14 days after it acquired knowledge of Claimant's alleged injury, file a notice stating that Claimant's right to compensation was controverted, as required by 33 U.S.C. 914(d), and yet has not filed the notice.

E) Employer made no installment payments of compensation under the Act prior to the March 4, 1976, Decision and Order award compensation under the Act.

F) Employer has tendered no showing that, owing to conditions over which it had no control, it could not make installment payments of compensation without an award.

Conclusions of Law

The claim is not barred because Claimant failed to file it within one year of his injury.

Employer was obligated, without an award, to make the first installment payment of compensation, under the Act, 14 days after Claimant sustained his injury, and to make subsequent payments as required by 33 U.S.C. 914(b) until this administrative law judge awarded compensation under the Act.

Employer's failure to make installment payments of compensation without award is not excused.

Decision

Claimant's claim was filled in a timely manner.

Employer is responsible for payment of the additional compensation required by 33 U.S.C. 914(e).

ORDER

To each installment of compensation that was payable without an award and that was not paid within 14 days after it became due, Employer shall add an amount equal to 10 percent of such installment and pay the sum to Claimant.

David W. Pelkey
Administrative Law Judge

Dated: January 21, 1977
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on January 31, 1977 the foregoing Supplemental Compensation Order was filed in the Office of the Deputy Commissioner, District of Columbia District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Halley I. Thomas, 1508 Howard Road, S.E.,
Washington, D.C. 20020
Claimant

Washington Gas Light Company
1100 "H" Street, NW
Washington, D.C. 20005
Insurance Carrier or Employer (if self-insured)

James F. Green, Esq., Ashcraft, Gerel & Koonz,
2101 L Street, NW, Suite 303
Washington, D.C. 20037.

Paul H. Harrington, Esq., 1100 "H" Street, N.W.,
Washington, D.C. 20005.
1100 "H" Street, N.W.
Washington, D.C. 20005

A copy was also mailed by regular mail to the following:

Judge David W. Pelkey, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210.

Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211.

JACK GARRELL
Deputy Commissioner
40th Compensation District U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

APPENDIX D

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

HALLEY I. THOMAS	)	
Claimant-Petitioner Cross-Respondent	)	Filed as Part of the Record
v.	)	Oct. 20 1976
WASHINGTON GAS LIGHT COMPANY	)	Susan Rambo
Employer-Respondent Cross-Petitioner	)	Benefits Review Board BRB Nos. 76-180 and 76-180A
	)	DECISION
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party in Interest	)	

Appeal from the Decision and Order of David W. Pelkey, Administrative law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Carl W. Belcher (Washington Gas Light Company), Washington, D.C., for the employer.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

These appeals are by the claimant and the employer from an Interlocutory Decision and Order (76-DCWC-4), dated September 24, 1975, and a final Decision and Order (76-DCWC-4), dated March 4, 1976, of Administrative Law Judge David W. Pelkey. The claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*,as made applicable to the District of Columbia by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (hereinafter referred to as the Act).

On January 22, 1971, Halley I. Thomas (claimant), a resident of the District of Columbia, was injured in the course of his employment with the Washinton Gas Light Company (employer). The accident occurred in Arlington, Virginia, and claimant has been receiving temporary total disability benefits from the date of injury pursuant to an agreement entered into by the parties and approved by the Virginia Industrial Commission on March 15, 1971.

Claimant notified the deputy commissioner of his intention to pursue a claim for benefits pursuant to the District of Columbia Workmen's Compensation Act in a letter dated September 24, 1974.

Mr. Thomas' claim was referred to the Office of Administrative Law Judges, and a hearing was held to determine whether, under the Constitution's full faith and credit clause, the claimant's compensation award under Virginia law was res judicata to the extent that it precludes a subsequent award of compensation under the District of Columbia Act. In an Interlocutory Decision and Order dated September 24, 1975, the administrative law judge determined that the claim under the D.C. Act was not so barred.

Subsequently, in a final Decision and Order dated March 4, 1976, Judge Pelkey awarded claimant benefits for permanent total disability from January 22, 1971, an additional ten percent compensation under Section 14(e) of the Act, 33 U.S.C. §914(e), interest, and attorney's fee.

The employer appeals contending that the Virginia award is entitled to full faith and credit in the District of Columbia, thus barring the award of benefits under the Act; that Mr. Thomas' claim under the Act is time-barred; and that the imposition of the Section 14(e) "penalty" is not in accordance with law.

Claimant appeals contesting the amount of the attorney's fee awarded by the administrative law judge.

Following oral argument on the issues in these appeals, the employer moved to remand this case for the admission and consideration of certain documents not a part of the record before the Board.

The Board has carefully analyzed the entire record in this case, the briefs of the parties, as well as the Motion to Remand submitted by the employer and the response thereto filed by the claimant. We are of the opinion that the unsatisfactory state of the record before us precludes the thorough consideration of the issues on appeal which the parties deserve. Thus, in order to complete the record, we remand this case to the administrative law judge to allow the admission and consideration of relevant documents included in the deputy commisioner's file bearing on the issues of the claim's timeliness and the Section 30 notice requirement under the Act, 33 U.S.C. §930, and the assessment of additional compensation pursuant to Section 14(e).

Accordingly, we remand this case to the Office of Administrative law Judges for further appropriate action consistent with the opinions expressed herein.

Ruth V. Washington, Chairperson

We concur:

Ralph M. Hartman, Member

Julius Miller, Member

Dated this 20th day of October, 1976.

SERVICE SHEET

BRB Nos. 76-180 and 180A:
HALLEY I. THOMAS
v.
WASHINGTON GAS LIGHT COMPANY

A copy of the attached Decision has been sent to following parties:

James F. Green, Esq. -Certified Mail-
2101 L Street, N.W., Suite 303
Washington, D.C. 20037

Carl Belcher, Esq. -Certified Mail-
1100 H Street, N.W.
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Miss Laurie M. Streeter
Associate Solicitor
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Washington, D.C. 20210

Jack Garrell
US DOL/ESA/OWCP
U.S. Department of Labor
1717 K Street, N.W.
Washington, D.C. 20211

Judge David W. Pelkey
Office of Administrative Law Judges
U.S. Department of Labor
Vanguard Building, Suite 720
Washington, D.C. 20036

APPENDIX E

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	)	
HALLEY I. THOMAS Claimant	)	Case No. 76-DCWC-4
v.	)	OWCP No. 40-89630
WASHINGTON GAS LIGHT COMPANY Employer	)	
SELF-INSURED	)	

JAMES F. GREEN, ESQ.
Ashcraft, Gerel and Koonz
925 15th Street, N.W.
Washington, D.C.
For the Claimant

PAUL H. HARRINGTON, ESQ.
1100 H Street, N.W.
Washington, D.C. 20080
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER

As a consequence of Claimant's request for compensation for permanent total disability, a hearing was held on August 7, 1975. At that hearing, the parties made record stipulations of facts and issues, testimony of Claimant and his wife was given, and each party introduced two exhibits into the record. The parties submitted that they did not then propose to tender medical evidence as to the nature and extent of Claimant's injury. Rather, they requested a resolution of Employer's challenge to jurisdiction based on the full faith and credit clause of the United States Constitution (Article IV, Section 1). They proposed that, should there be a finding of jurisdiction under the District of Columbia Workmen's Compensation Act (36 D.C.C. 501, *et seq),* medical reports would then be incorporated in the records for evaluation.

On September 24, 1975, an Interlocutory Decision and Order issued holding that, under the full faith and credit clause of the United States Constitution, the compensation award made to Claimant under the Virginia Compensation Act is not *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia Compensation Act.

By this reference thereto, the September 24, 1975, Interlocutory Decision and Order is incorporated herein as though fully set forth herein.

On January 16, 1976, the administrative law judge was advised that the parties elected to have no further hearings relating to the merits of the claim and that they proposed to have a decision on the merits based on the then record, as supplemented by documentation to be submitted.

Accordingly, three issues are to be adjudicated herein:

A)Whether, as a result of his January 22, 1971, injury and under District Law, Claimant suffered permanent and total incapacity to earn the wages he was receiving, at the time of the injury, in the same or any other employment.

B)Whether, Employer not having filed the report required by 33 U.S.c. 930(a), 330 U.S.C. 930(f) has tolled the running of the period set forth in 33 U.S.C. 913(a) for filing a claim for compensation so as to render Claimant's September 1974 claim timely for his January 1971 injury.

C)Whether, if an award is payable under District law, Employer should be charged with payment of additional 10 percent amounts under 33 U.S.C. 914(e), interest, costs, and attorney's fee.

Statement of the Case

On February 17, 1976, the administrative law judge received medical reports from Claimant's attorney representing joint submissions by the parties. On the basis of the date of the first, or only, submission by each doctor, the essential substance of each report is set forth hereafter.

A Dr. Henesy reported that a January 22, 1971, X-ray examination of Claimant revealed no evidence of injury or disease of the lumbosacral spine.

A January 23, 1971, report was the first of 16 reports submitted by Dr. Cooney, a neurological surgeon. It reflected a history given by Claimant that referenced the January 22, 1971, injury. Reportedly, Claimant complained, chiefly, of acute back pain; additionally, there was a report of mild back discomfort. As a result of his examination, the doctor was of the impression that an acute lumbosacral strain had been experienced. He recommended traction, physical therapy and medication.

On February 18, 1971, the doctor noted Claimant's failure to respond to conservative therapy, performance of a myelogram that revealed protrusion to the left of an L4 central disc, February 8 disc surgery, and discharge to be followed as an outpatient.

A March 5, 1971, report was occasioned by Claimant's development of discomfort in the low back and left hip. Examination revealed limited motion in the lumbosacral

spine and muscle spasms. Claimant was considered yet to be "temporarily totally disabled." Home use of analgesics, muscle relaxants and moist heat was prescribed.

On April 15, 1971, the doctor noted Claimant's rehospitalization on March 9, traction treatment, myelogram revelation of defect at L4-L5 level, nerve root decompression on March 26, and discharge, free of pain, to be followed as an outpatient. Final diagnosis; ruptured disc at L-4.

An April 23, 1971, report reflected improvement but occasional discomfort in the low back and leg. Noting that Claimant was still totally disabled and recovering from surgery, the doctor recommended medication, when necessary, and another visit in one month.

A month later, May 21, Claimant's complaints were reported as unchanged. He was found still to be symptomatic following surgery. Longer use of a back support, rest and medication were recommended for the then still totally disabled patient.

A July 14, 1971, report noted June 2 hospitalization for persistent left leg pain, tests resulting in a consensus among four physicians that Claimant had neuritis, July 3 discharge for home rest and mild analgesics, and contemplated surgery absent lessening of symptoms.

On August 4, 1971, the doctor reported Claimant's rehospitalization on July 12 because of "the intractable nature of his left leg pain", July 22 surgery that included a sensory rhizotomy of the L5 root and spinal fusion, August 31 discharge without leg pain, and, while still totally disabled, future observation as an outpatient.

A September 1, 1971, document indicated that Claimant was "recovering nicely from his complicated case," that he was given medication to facilitate sleep, and that another visit was scheduled for follow-up one month later.

On October 11, 1971, the doctor acknowledged Claimant's complaints of occasional pains in the low back and left leg, and noted advice that Claimant "avoid sitting as much as possible" and return in one month.

Claimant was reported, on November 8, 1971, to be do-

ing "fairly well" while complaining of occasional low back and left leg pains and expressing anxiety to return to some form of work. More than three months having passed since surgery, the doctor opined that he could perform light duty and return for examination in six weeks.

On December 6, 1971, the doctor noted development of severe pain behind the left knee and mild low back pains. Because Claimant had not yet returned to work, a 10-day medication program was scheduled to precede a determination of his ability to return to "light duty."

A January 12, 1972, report reflected Claimant's ability to work but " a few days" because of persistent pain behind the left knee, continued total disability, prescription of medication, and a scheduled evaluation one month later.

Claimant's condition on March 8, 1972, was essentially unchanged. The persistent sciatica was attributed to adhesions about the nerve root which, the doctor opined, might require a long time to subside. Although total disability remained, no need was seen for further studies.

Approximately 10 months later, on January 12, 1973, the doctor noted that Claimant's left leg pain had persisted and that mild low back pain had recently reappeared. He submitted that Claimant had "significant" residuals of his ruptured disc and assessed a 35 percent permanent disability.

On November 7, 1975, the doctor noted that Claimant had been seen by a Dr. Rizzoli and that the patient reported an inability to work because of back and leg discomfort. He again assessed a 35 percent permanent partial disability attributable to residuals of the ruptured disc.

A Dr. Harrell submitted a May 28, 1971, report to the Industrial Commission of Virginia. It referenced the January 22 accident; diagnosed acute lumbosacral strain and a ruptured disc at L4-L5; and recommended treatment by traction, physical therapy, medication, hospitalization and operation. The report indicated that the physician had seen Claimant on the day of the accident. The doctor also submitted an August 8, 1971, report in which he referenced surgical procedures on February 8 and March 26, 1971, and indicated the possibility of future surgery. He submitted that it was questionable that Claimant would again be "a useful employee in the T&D Department."

One Dr. Collins submitted a January 18, 1972, report reflecting a July 13, 1971, examination of Claimant following two surgical experiences. An examination resulted in a finding of recurrent nerve root irritation and flexion contracture of the left knee. He recommended spinal fusion of L4 to the sacrum. Office visits on August 31, October 8, November 5, and December 17, 1971, followed the recommended surgery. On the date of the last visit Claimant was no longer reporting back pain, but he continued to report occasional pain around the left thigh that was concentrated at the back of the left knee. The doctor recommended reduced use of the back brace Claimant had worn since the surgery.

A Dr. Rizzoli, a neurological surgeon, submitted the first of five reports on February 6, 1973. At that time, Claimant complained of low back and left leg pain. After an examination, the doctor had the impression that Claimant had residuals of ruptured lumbar disc disease. He recommended electrical studies of and physiotherapy to the left leg along with spine studies. He foresaw possible need for another myelogram. By a February 20 addendum to the report, he opined that Claimant had a 50 percent permanent partial disability.

The doctor's second report, on March 22, 1973, noted hospitalization between February 27 and March 22, 1973. During that time, surgery was discussed but not recommended. Conservative treatment was given and recommended for the future with a review of the condition after one month. At that time, the doctor believed that Claimant was unable to return to work.

A third report, dated April 23, 1973, revealed unchanged complaints. The doctor noted improvement in that a right leg problem, one that was considered during hospitalization, had disappeared. However, he still did not feel Claimant could return to work.

The doctor's September 25, 1973, report reflected unchanged complaints. After examination, he felt that further surgery was not then indicated. He recommended medication to facilitate sleep.

The surgeon's last report was dated June 11, 1974, and noted unchanged complaints. The doctor recommended against further surgery. He recommended pain and sleep medication. He reported having advised Claimant to seek occupational rehabilitation and "another form of employment."

A Dr. Chiu forwarded Dr. Rizzoli a February 13, 1973, report of a February 9 examination oriented to rehahilitation. On the basis of partial denervation at L5-S1 root and chronic irritation of an adjacent root, the doctor proposed a program of physical therapy and reevaluation after two weeks.

A February 26, 1975, examination of Claimant by a Dr. Smith was the basis of a report reflecting complaints of progressively severe pain in the low back and left leg. After examination, the doctor felt that Claimant exhibited residuals from lumbasr disc disease and multiple surgical procedures. He saw no indication of a need for further surgical procedures, but recommended analgesics and physical therapy. The doctor concluded his report with the statement that Claimant "will reconsult this office as need be for his symptoms."

The last report made of record was the January 9, 1976, report of Dr. Schuster, an orthopedic surgeon. It was based on a December 22, 1975, examination, prior to which Claimant complained, chiefly, of pain in his low back that radiated down the left leg. A history of a January 1970 injury was recited that paralleled Claimant's history after his January 1971 injury. On the basis of his examination, the doctor diagnosed residual instability of the spine and residual sciatic radiculitis on the left side. The orthopedist opined that the back problem began with the "injury of January 1970" and that Claimant then (January 1976) did not have solid fusion in the spine. He found Claimant to be unable to perform" any type of heavy manual labor"

and he assessed a permanent 50 percent partial disability of the body as a result of the spinal problem. He forecasted a need for additional surgery to reexplore involved areas and to reinforce the spinal fusion.

Discussion

Medical documentation submitted by the parties is considered to be sufficiently substantial to support the determination that, as a result of the January 22, 1971, injury, Claimant has suffered a permanent and total loss of capacity to earn the wages he was receiving at the time of the injury.

When examined in connection with other medical evidence of record, Dr. Henesy's finding is considered to be of no persuasive value.

Dr. Cooney's reports through October 11, 1971, are read as depicting a total disability under the Act. His November 8, 1971 report suggests a condition that will tolerate "light" duty, but succeeding reports through March 8, 1972, again reflect total disability. The reports of January 1973 and November 1975 make no reference to ability to work, but reflect a medical disability rated at 35 percent. In view of the fact that the reports reflect that, between January 1971 and November 1975, Claimant experienced disability in spite of extensive medical care and treatment, it is considered reasonable to conclude that, medically, the disability is permanent in nature.

As early as August 1971, Dr. Harrell, a professional who is acquainted with Claimant's job requirements, questioned Claimant's future ability to resume the job requirements performed at the time of the injury.

Dr. Collins' January 1972 opinion that Claimant's recovery progress required monitoring is not read as one recognizing a capacity to perform hard manual labor.

In February 1973, Dr. Rizzoli found a permanent medical disability rated at 50 percent. In June 1974, he recommended occupational rehabilitation and an attempt

to find another "form" of employment. Such is interpreted as being reflective of an opinion that Claimant was then permanently without capacity to perform work such as he performed for Employer at the time of the injury.

Dr. Chiu's opinion that there was need for physical therapy attending a nerve condition is not considered to be one reflecting a capacity for manual labor.

The report of Dr. Smith, an associate of Dr. Rizzoli, is read as reflecting a condition that is not subject to medical or surgical correction. It is reflective of the presence of a disability that Claimant will have to experience with hope, at best, of alleviation of symptoms of discomfort.

Dr. Schuster's January 1976 opinion that, medically, Claimant has a 50 percent permanent disability that may require future surgery is read as decriptive of a condition that will not accommodate hard manual labor.

Furthermore, testimony at the hearing, uncompromised and minimally challenged, reflects a condition of permanent total disability under the Act. Observation of the Claimant during the hearing buttresses the testimony.

All of the foregoing has been evaluated in connection with the following propositions:

A) A finding of permanent disability is not precluded by a medical prognosis that an employee is likely, at some indefinitive future date, to get better and to be able to return to work *(Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649 (CA5, 1968).

B)Disability should be evaluated in economic, rather than in medical, terms *(Owens* v. *Traynor,* 274 F. Supp. 770; affirmed 396 F.2d 783; certiorari denied 89 S. Ct. 401, 393 U.S. 962, 21 L. Ed. 2d 375.

C) Under the Act, the ability to earn is the test of the right to compensation *(United Engineering Co.* v. *Pillsbury,* 92 F. Supp. 898; affirmed 187 F.2d 987; affirmed 72 S.Ct. 223, 342 U.S. 197, 96. L.Ed. 225).

In connection with all of the foregoing it is concluded that, as a result of the January 22, 1971, injury, Claimant has permanently and totally lost the capacity to earn the wages he was receiving, at the time of the injury, in

employment by Employer or in any other employment.

The record reveals that, in spite of the fact that Claimant sustained injury on January 22, 1971, his September 25, 1974, filing of his claim under the Act was timely. Employer did not address the matter on brief. Claimant, on brief, accurately submitted that Employer had knowledge of the injury on the date it was sustained and that, on the date of the hearing, had not filed the report required to be filed by 3 U.S.C. 930(a). Too, Claimant accurately submitted that, whereas 33 U.S.C. 913(a) bars a claim unless it is filed within one year after an injury, 33 U.S.C. 930(f) provides that the one year period of limitation does not begin to run against the claim until the report required by 33 U.S.C. 930(a) has been filed. The record supports the conclusion that the one year statute of limitation had not begun to run on September 25, 1974.

The record does not contain sufficient evidence to enable the administrative law judge to determine whether the additional 10 percent payment required under 33 U.S.C. 914(e) must be applied to the first, or any succeeding, installment payment made by Employer. Consideration of 33 U.S.C 914(b) and (e) reveals that Employer should have made the first installment payment by February 19, 1971. The date of first payment or any succeeding payment does not appear of record. The record only reflects that as of February 5, 1971, Employer and Claimant executed a written agreement that compensation under the Virginia statute would be paid from January 30, 1971.

On brief, Claimant accurately submitted that Employer filed no notice of controversion complying with the requirements of 33 U.S.C. 914(d). Additionally, the record contains no evidence that Employer sought excuse for untimely payment(s) on the basis that timely payment of any installment could not be made because of conditions over which Employer had no control.

Accordingly, the administrative law judge can but determine that, as to any installment of compensation, payable without award, that was not paid when due, Employer is

obligated pay Claimant an additional amount equal to 10 percent of the amount of any such installment.

On February 17, 1976, the administrative law judge received Claimant's petition requesting award of attorney's fee. In the petition, Claimant's attorney submitted that he has represented Claimant since July 1973. For the purpose of determining the amount of the fee to be awarded, the submission is not accepted. Documentation submitted by Claimant indicates that the attorney/client relationship attached to this claim on or about September 24, 1974. For this reason, and because the attorney's specifications of services rendered are identified neither by dates nor time frames, much is left to be desired in the form of assistance to the administrative law judge during his evaluation of the petition.

Counsel solicited consideration of the knowledge and experience of his firm in effecting an award of a fee. Such has been considered, and recognition has been accorded the proposition that the claim presents an uncomplicated factual situation. The foregoing, coupled with the background and experience of the administrative law judge, have rendered certain elements of the fee petition unacceptable. Commitments of time for purposes listed below are determined to be excessive.

A) 14 hours for client interviews and preparation for hearings. Reasonably, such could have been accomplished in 9 hours.

B) 18.5 hours for consultations with representatives of Employer and the Department of Labor. Reasonably, such could have been accomplished in 8 hours.

C) 37 hours for research. No more than 24 hours (3 days) were reasonably required to research matters involved herein.

D) 2.5 hours to prepare and submit final documentation. The product submitted reasonably required no more than an hour.

Accordingly, allowance of a fee for 46.5 hours of services rendered Claimant herein, at the hourly value counsel placed on his services, is determined to be

reasonable. Award of a fee totalling $1,860.00 is hereby made and approved.

Finding Of Fact

As a result of the January 22, 1971, injury, Claimant has permanently and totally lost the capacity to earn the wages he was receiving, at the time of the injury, in employment by Employer or in any other employment.

Conclusion of Law

As a result of the January 22, 1971, injury and since that date, Claimant has been rendered permanently and totally disabled.

Decision

As a result of a January 22, 1971, injury, Employer is obligated to pay Claimant compensation for permanent total disability from January 23, 1971.

The claim is not barred because of Claimant's failure to file his claim within one year of January 22, 1971.

As to any installment of compensation, payable without an award, that was not paid when due, Employer is obligated to pay Claimant an additional amount equal to 10 percent of the amount of any such installment.

Order

That Employer pay Claimant compensation for permanent total disability, beginning January 23, 1971, based on average weekly wages totalling $114.67.

That Employer deduct, from amounts due and payable under this Decision and Order, any amounts paid to Claimant, for the January 22, 1971, injury, under the Virginia Compensation Act.

That, as to any installment of compensation that was required to be, but was not paid within 14 days after it became due, Employer pay Claimant an additional amount equal to 10 percent of any such installment.

That, as to any installment not paid when due, Employer pay Claimant interest an annual rate of 6 percent until date of payment.

That Employer pay James F. Green, Esq., $1,860.00 for services rendered Claimant herein.

David W. Pelkey
Administrative Law Judge

Dated: March 4, 1976
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on *March 5, 1976* the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, *District of Columbia* District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:
Mr. Halley I. Thomas, 1508 Howard Road, S.E., Washington, D.C. 20020
Claimant

Washington Gas Light Company, 1100 "H" Street, N.W. Washington, D.C. 20005
Insurance Carrier or Employer (if self-insured)
James F. Green, Esq., Ashcraft, Gerel and Koonz, 925 - 15th Street, N.W. Wash., D.C.
Paul H. Harrington, Esq., 1100 "H" Street, N.W. Washington, D.C. 20080

A copy was also mailed by regular mail to the following:

Judge *David W. Pelkey,* Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210
Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite

N-2716, NDOL, Washington, D.C. 20210
Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211

JACK GARRELL
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs.

Form LS–19
Rev. Aug. 1975

APPENDIX F

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

In the Matter of:	:	
HALLEY I. THOMAS *Claimant*	:	
	:	Case No. 76-DCWC-4
v.	:	OWCP No. 40-89630
WASHINGTON GAS LIGHT COMPANY *Employer*	:	
SELF-INSURED	:	

JAMES F. GREEN, ESQ.
Ashcraft, Gerel and Koonz
925 15th Street, N.W.
Washington, D.C.
For the Employer

PAUL H. HARRINGTON, ESQ.
1100 H Street, N.W
Washington, D.C. 20080
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

INTERLOCUTORY DECISION AND ORDER

Claimant seeks compensation for permanent total disability from January 21, 1971, additional 10 percent payments under 33 U.S.C. 914[e], fees and costs under 33 U.S.C. 928, and 6 percent interest on unpaid installments of compensation, under the Longshoremen's and Harbor

workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.* Hereafter, those acts are cited as the Act. This Decision and Order follows an August 7, 1975, hearing that was conducted in accordance with 5 U.S.C. 554. At that hearing, the parties represented that they had reached agreements as to issues to be adjudicated and as to facts to be taken as admitted. Those agreements, framed as stipulations, follow:

Stipulation of Issues to be Adjudicated

Whether, under the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1), the compensation award made to Claimant under the Virginia Compensation Act is *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia (District) Compensation Act.

Whether, as a result of his January 22, 1971, injury and under District Law, Claimant suffered permanent and total incapacity to earn the wages he was receiving, at the time of the injury, in the same or any other employment.

Whether, Employer not having filed the report required by 33 U.S.C. 930(a), 33 U.S.C. 930(f) has tolled the running of the period set forth in 33 U.S.C. 913(a) for filing of a claim for compensation so as to render Claimant's September 1974 claim timely for his January 1971 injury.

Whether, if an award is payable under District law, Employer should be charged with payment of additional 10 percent amounts under 33 U.S.C. 914(e), interest, costs, and attorney's fee.

Stipulation of Facts to be taken as Admitted

Claimant's January 22, 1971, injury arose out of and in the course of his employment by Employer.

On January 22, 1971, an employer/employee relationship existed between the parties.

At the time of injury, Claimant's average weekly wages was $114.67.

But for the period from December 27, 1971, through January 3, 1972, Employer has paid and continues to pay compensation for total disability under the Virginia Compensation Act since the date of the injury.

Employer has paid $57 for physical therapy treatments given to Claimant since the injury.

At the opening of the hearing, the parties submitted that they did not then propose to tender medical evidence as to the nature and extent of Claimant's injury. They expressed the desire that the administrative law judge, initially, issue a Decision and Order resolving Employer's full faith and credit/ *res judicata* challenge to jurisdiction under District law. They stipulated that, if there be a finding of District jurisdiction, all treating physicians' reports will be introduced into the record. Additionally, they stipulated that Claimant has the right to get a medical report and evaluation from an "independent" physician to be selected by Claimant and that Employer has the right to submit observations on such report and evaluation. The procedural plans were adopted by the administrative law judge.

Statement of the Case

Claimant was the first witness. He stated that he was 32 years old, married, the father of one child, possessor of an 11th grade education, and a resident of the District since 1949. The witness said that Employer's main office is in the District and that he was employed by Employer at its District employment office in January 1970. He represented that he began employment as a custodian (building cleaner), a job similar to one he had held in the past, but one for which he had no other training. At the time of his injury, he had become one of Employer's laborers, and was involved in repair of pipes Employer placed in streets. For such work, he had no special training; it required use of jackhammers, picks and shovels. Prior to his injury, approximately 60 percent of his work had been in the District, 20 percent had been in Virginia and 20 percent in Maryland.

The witness testified that, on the day of the injury, he had been working in Virginia, out of a Virginia office of Employer, for approximately two months. During that period, he was paid by checks drawn on a District bank and he could be, and was, recalled from time to time to work in the District. (Employer stipulated that Claimant could be "fired" by the Employer's District office while he was assigned to work in Virginia).

Claimant said that, the day he was injured, he was using 35-pound and 95-pound jackhammers to break concrete. He bent over while using a 35-pound hammer and was unable to straighten up. His foreman was called and he was taken to the District where he was examined by Employer's nurse and sent to a physician selected by Employer. On that same day, Claimant was hospitalized.

Successively, he was operated on for a ruptured disc, released to go home after approximately 28 days, hospitalized for surgery to remove disc fragments, released, hospitalized without surgery, released, hospitalized for a third operation, released, and hospitalized for a fifth time without surgery in May 1973. During those experiences, and successively, he was attended by three physicians. He has been under care of the third physician since the last hospitalization, on a need-for-relief-from-pain basis, and last visited that doctor's office in April 1975. He has also had a short period of physical therapy treatment that was paid for by Employer.

Claimant represented that he has experienced pain in the back area at regular and frequent intervals since the injury. As of the date of the hearing, he indicated, he was unable to sit for a long period of time, to maintain one position for a long period, to be flat on his back, or to lie on his stomach. He said that his doctor has told him not to drive a car, mow a lawn or lift more than 11 pounds.

He said that from December 27, 1971 through January 3, 1972, as a result of Employer's offer, he performed filing duties in one of Employer's offices. Pain prevented him from doing the sitting and bending required for such work and, on the latter date, Employer's nurse sent him home. He has not worked since January 3, 1972. Since that date, Employer has offered him no work and he has sought no other work. He submitted that he has sought no work because of his physical condition. He proposed that he did not know what work he can do and that, if Employer would not hire him, no employer would hire him. He expressed the belief that his health has rendered him unemployable. Claimant noted that Employer has paid disability compensation under Virginia Law (but for the short period he worked) since the injury and that he now receives total disability compensation under the Social Security program.

Claimant's wife testified that Claimant has appeared never to be free of pain since the injury. She noted that his condition limits his capacity to work around the house and to engage in physical activity with his child. She stated that she has observed no indication that time has resulted in a reduction of severity or frequency of pain experienced by her husband.

Each party made documentation part of the record. Claimant's exhibits were: A) a copy of a September 24, 1974, notice, to the Department of Labor, of a claim for benefits, under the District Compensation Act, arising out of a January 20, 1971, injury in Arlington, Va; and B) a copy of an October 2, 1974, letter from the Department of Labor to Employer suggesting that the injury was covered by the Act and asking Employer's opinion relative thereto. Employer's exhibits were: A) a copy of a February 5, 1971, Memorandum of Agreement as to Payment of Compensation, signed by Claimant and Employer, covering compensation payments under the Virginia Workmen's Compensation Law, and B) a copy of a March 15, 1971, Industrial Commission of Virginia Award approving the referenced agreement.

Discussion

On brief, Employer challenged jurisdiction by discussing the following propositions: A) whether, under the full faith and credit clause, the Virginia compensation award bars an additional award under District law; and B) whether, by its terms, the Virginia compensation statute precludes a District award after an award has been made under the Virginia Statute. Employer acknowledged that, but for the Virginia award, the instant claim would be cognizable under District law.

A lesser portion of the brief was devoted to the first proposition. In connection therewith, Employer submitted that Claimant's Virginia award had become final. By reason thereof, the full faith and credit concept precluded District assumption of jurisdiction to enter another award. In support of the position, Employer cited so much of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208 (December 20, 1943), as indicated that an employee, seeking a compensation award in a second state after having received a prior award in another state, may be faced with a full faith and credit consideration.

A larger portion of the brief was devoted to the second proposition. In connection therewith, Employer submitted that the language of the Virginia statute and Virginia Court decisions indicate, in the statute, a "clear intent" to preclude subsequent recovery of benefits in another jurisdiction after receipt of compensation under the Virginia statute.

Employer referenced so much of Section 65.1-40 of the Virginia law as provides that rights granted under the statute, when accepted, "shall exclude all other rights and remedies xxx at common law or otherwise." The language of the provision was said to be "all inclusive" and, because Employer found no Virginia Court decision

limiting the effect of the language, its "plain meaning" (as expressed by Employer) should control in a determination of legislative intent. The representation that there is a "plain meaning" of the language is unpersuasive. Extensive litigation involving similar statutory provisions, coupled with Employer's failure, to ascribe a meaning to the language by Virginia courts, persuasively indicates that the language has no "plain meaning." The quoted statutory language reasonably can be read to relate to the exclusion of all other rights under Virginia common law and to the exclusion of all other remedies otherwise provided by Virginia statutes.

Employer submitted that the "other rights" excluded by the statute include the right to seek the award sought by Claimant under District law. The submission is not supported by the *Magnolia* statement that a state is without power to give extraterritorial effect to its laws. Too, absent convincing evidence to the contrary, such "other rights" reasonably can be read to relate to rights under Virginia law. Finally, absent a convincing legislative statement of such intent, no justification appears for reading the collective mind of the Virginia legislature as having intended to enact a law that has the extraterritorial effect of depriving another state of jurisdiction over a matter in which the other state has a legitimate interested.

Employer submitted that "or otherwise" refers to rights not previously existing under the common law, and would include the right to receive compensation benefits under the law of a jurisdiction other than Virginia. Here, again, Employer adopted the extraterritorial posture referenced earlier. Reasonably, in the phrase "at common law or otherwise," the latter two words are readable as applying to a Virginia statutory enactment such as a wrongful death statute.

Employer cited *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2 530 (1942), and *Humphries v. Boxley*

Bros., Co., 146 Va. 91, 135 S.E. 890 (1926), to support its position that the Virginia statute was designed to exclude an award in another state after an award is made in Virginia. Examinations of those decisions reveal that they dealt with Virginia's compensation law *vis-a-vis* the Virginia common law action for damages; those decisions were not concerned with an extraterritorial thrust of the statute. Accordingly, they are not considered to be appropriate for application to the instant situation.

Employer cited *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622, 67 S.Ct. 886 (March 31, 1947), for the proposition that only unmistakable language in one state's statute should be construed as precluding compensation proceedings under another state's statute and proposes that the language in the Virginia statute is so unmistakable.

On brief, Claimant also addressed the full faith and credit concept from award and statutory language approaches. Relative to the Virginia award, Claimant submitted that, were it recognized as a bar to a District award, violence would be done to the ruling in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S. Ct. 801 (March 10, 1947). The submission is rejected. No award was involved in *Cardillo*. Claimant also submittred, without elaboration, that, as a supplement to the Virginia award, a District award would not violate the concept if amounts paid under the Virginia award were credited to Employer under a District award.

In addressing the exclusive character of the language of the Virginia statute, Claimant cites the *McCartin* requirement of unmistakable language by a state legislature to support the exclusion of an additional award in another jurisdiction. Claimant submits that the language in the Virginia statute is comparable to the statutory language involved in *McCartin*. The language in *McCartin* was not found to be so exlcusive as to

preclude an additional award. Claimant proposes that the Virginia language is not so exclusive as to preclude an additional award under District law.

Disposition of the jurisdictional challenge dictates consideration of the full faith and credit clause (U.S. Const., Art. IV., Sec. 1) and a statute implementing the clause. In pertinent part, Article IV provides that each state shall give full faith and credit to the public acts, records, and judicial proceedings of every other state. 28 United States Code 687 provides, in pertinent part, that every court in the United States must give such faith and credit to a state's act, record or judicial proceeding as is given that act, record or judicial proceeding (by law or usage) by the courts of the state in which the act, record or judicial proceeding was taken.

That compensation awards have been treated as judgments, for purposes of *res judicata,* is established by court treatment of such awards. In *Magnolia,* the court found that, under Texas law, a compensation award that has become final is entitled to the same faith and credit as a judgment of a court, In *McCartin,* the court found that, under Illinois law, a compensation award is *res judicata* on matters adjudicated and agreed upon therein. For purposes of *res judicata,* a United States District Court has treated an award under Virginia law as a judgment (*Perrin v. Brunswick Corp.*, D.C., W. D. Va., November 5, 1971, 333 F. Supp. 221). The U.S. Supreme Court treated the Virginia compensation law in *Dillard v. Virginia Industrial Commission,* 416 U.S. 783, May 15, 1974, and held, *inter alia,* that: A) if an award is not timely challenged, it is conclusive until changed by the Commission; and B) in a ministerial capacity, a Virginia court will enforce an award. Accordingly, it is concluded that, in the instant matter, Claimant's award under the Virginia compensation law must be given such faith and credit in the District as it is given in Virginia; that, to the extent that the Virginia award is *res judicata* in Virginia, it is *res judicata* in the District.

Employer proposes that *Magnolia* supports the submission that, because there was *an* award under Virginia law that was coupled with payment and acceptance of payment thereunder, the full faith and credit clause bars *any* award under District law; that, as *res judicata,* the terms of the *specific* Virginia award bars *any* award under the District law. Such a proposal is acceptable if the Virginia award precluded any further award under Virginia law. If the Virginia award did not preclude a further award of compensation in Virginia, the proposal is not acceptable.

The decision in *Magnolia* supports the imposition of the conditions placed upon the acceptability of Employer's proposal. In controlling part, *Magnolia* held that, to the extent that the Texas award was *res judicata* in Texas, it was *res judicata* in Louisiana. The court found that: A) by its terms, the Texas award (constituting "full compensation for his injury") was a conclusive determination, betwen the parties, that the employer should be liable to the employee, relative to the injury, for no more than the amount of the Texas award; B) under Texas award and law, the employee was precluded from receiving any compension in Texas that exceeded the amount of the award; C) because the Texas award was a bar to any further recovery of compensation in Texas, it was under the full faith and credit concept, a bar to the further remedy under Louisiana law; and D) Louisiana was without power to deny that the Texas award had the same binding effect on the parties in Louisiana as it had on the parties in Texas. Significantly, the essence of the *Magnolia* decision is read to be that, because *the* terms of *the* Texas award precluded further compensation in Texas, they precluded further compensation in Louisiana. Significantly, there is an absence of a holding that, becuase there had been *an* award in Texas, *a* further award in Louisiana was precluded.

Claimant submits that *Magnolia* does not support Employer's proposal because the ruling therein was

distinguished in the Surpeme Court's ruling in *McCartin* by the finding that the *McCartin* clause did not specifically preclude recovery in other jurisdictions. Claimant submits that the *Magnolia* clause was found to be so exclusive.

In *McCartin,* as similarly in *Magnolia,* the court held that, to the extent that the Illinois award was *res judicata* in Illinois, it was *res judicata* in Wisconsin. The court found that: A) by its terms, the Illinois award determined the total amount the employer was required to pay the employee under the Illinois compensation law; B) by its terms, the Illinois award did not affect any rights that the employee may have had under Wisconsin law C) the actions of the Illinois Industrial Commissioner in approving an agreement and effecting the award containing a reservation of right under Wisconsin law, reflected the fact that, under Illinois law, a *McCartin-type* award did not preclude an additional award under the law of another state; and D) rather than having been intended as conclusive of all rights to compensation arising out of the injury, the award was determinative of compensation payable under Illinois law and not determinative of compensation subsequently payable under Wisconsin law. Significantly, the essence of the *McCartin* decision is read to be that, because *the* terms of *the* Illinois award recognized and preserved the employee's right to pursue a subsequent remedy under Wisconsin law and did not preclude attempts to obtain further compensation under Wisconsin law, the award was not *res judicata* as to any amount of compensation that might be payable for the injury under Wisconsin law. The court found that the award was *res judicata* only as to the amount the employer had to pay the employee under Illinois law. The court noted that it found nothing in Illinois law or decisions under it that was designed to preclude recovery in Wisconsin.

On the basis of the foregoing, it is concluded that *Mc-*

Cartin and *Magnolia* reflect the court's application of one legal principle to two factual situations.

Attention is now directed to consideration of the extent to which Claimant's March 15, 1971, Virginia award is *res judicata* in Virginia. By its terms, the award required payments, as follows:

A) During "incapacity," payments at a $62 weekly rate, beginning January 30,1971.

B) *If* the incapacity exceeded six weeks, Claimant was to be paid such amounts "as *may be* awarded" (underscoring supplied) for partial incapacity of any members of the body except those covered by the "schedule loss" provisions of the compensation law. (The payments, subject to a set minimum amount, were to be based on Claimant's average weekly wages before his injury and the wages he was able to earn after the injury; they were not to exceed $62 weekly for 500 weeks).

C) In addition, if the partial incapacity involved members covered by the schedule loss provisions of the statute, Claimant was to be paid the dollar amounts for the time periods specified by those provisions and the state commission was to be so advised.

D) Further in addition, if total incapacity, as distinguished from total and permanent incapacity, exceeded six weeks, Claimant was to be paid (subject to express minimum and maximum amounts) a stated percent of his average weekly wages for not longer than a specified number of weeks. For total and permanent incapacity (statutorily defined as loss of both hands, arms, feet, legs, eyes, or any two thereof, total paralysis, or brain injury resulting in incurable imbecility or insanity, such payments were to be made without limitation as to time, with advice to the commission.

An examination and evaluation of the terms of the Virginia award are determined to be supportive of the conclusion that it was in the nature of an "open end" award. It effected definitive and specific provision for payment of compensation only if the initial incapacity

lasted six weeks and it covered only those six weeks. It was designed to provide for such periods and natures of incapacity that might mature and to pay compensation only during the period(s) that Claimant might be involuntarily unemployed due to injury. The award did not effect a final settlement of the rights and liabilities of the parties. Rather, by its terms, it contemplated further awards.

Further, Virginia Supreme Court of Appeals held, in *Griffith v. Raven Red Ash Coal Co.*, 20 S.E.2 530, June 8, 1942, that an essential of *res judicata* is that the issue raised in a second suit must be identical with the issue, or one of the issues, raised and determined in the first suit. In the instant matter, the issue is whether Claimant is entitled to compensation for permanent total disability under District law. In the Virginia compensation proceeding, the issue was whether Claimant was entitled to compensation for what was then to be determined as no more than a temporary total disability. The issues are not considered to be identical.

Still further, Virginia courts have indicated that, after an award and during the whole compensation period applicable to the injury in question, the relation of the Virginia Commission to the award is that of a court to a judgment during the term at which it was rendered. (*American Mutual Liability Insurance Co. v. Hamilton,* 135 S.E. 21, 145 Va. 391 (1926); *Old Dominion Land Co. v. Messick,* 141 S.E. 132, 149 Va. 330 (1928). The propositon that a judgment is not a final determination until the end of "term time" is so widely accepted as to render citation of support thereof unnecessary.

Yet still further, a ruling by a court in Wisconsin, a pioneer state in workmen's compensation legislation, is persuasive. In *Spietz v. Industrial Commission,* S.Ct. Wis, 28 N.W.2 354, 251 Wis. 168 (July 1, 1947), a Wisconsin resident was given a Montana award of $17 per week, for not to exceed 300 weeks, for temporary total disability; payments were to continue if there be permanent partial

disability. Subsequently, an award was made under Wisconsin law. The court held that the award was not final as to partial disability, if any, when the temporary total disability terminated. The Montana award was not *res judicata* so as to preclude the Wisconsin award. The concept stated in *Spietz* is adopted herein.

In view of the foregoing, it is determined that, because the Virginia award was not a bar to further recovery of compensation in Virginia, it was not, under the full faith and credit concept, *res judicata* as a bar to further recovery of compensation under District law.

Employer submits that the provision in the Virginia compenstion statute that makes an employee's rights thereunder exlusive of all others, "at common law or otherwise," precludes assumption of jurisdiction under District law. The submission is deemed to be inconsistent with an interpretation, by the Supreme Court of Appeals of Virginia, that the purpose of the exclusive remedy section is to exclude the common law remedies of an employee under Virginia law (*Griffith v. Red Raven Ash Coal Co.,* June 8, 1942, 20 S.E.2 530; *Fauver v. Bell,* June 18, 1951, 65 S.E.2 575).

Further, that court has variously stated that the Virginia law was enacted for the beneficent purpose of attaining a humanitarian end which had hitherto been frustrated by the inexorable rules of the common law (*A. Wilson and Co. v. Matthews,* March 10, 1938, 195 S.E. 490); that, because the purpose of the law was to protect the employee, it should be construed liberally in his favor (*Ellis v. Commonwealth of Virginia,* January 24, 1944, 28 S.E.2 730); and that the purpose of the law is to provide compensation to a workman for the loss of his opportunity to engage in work *(Burlington Mills Corp. v. Hagood,* February 24, 1941, 13 S.E.2 291).

In *McCann v. Newport News Shipbuilding and Dry Dock Co.,* D.C., E.D. Va., October 22, 1959, 177 F. Supp. 909, the court indicated that an award by another state would not preclude jurisdiction under the Virginia law.

More generally, a court has held that, in workmen's compensation case, the state where an injury occurred or the state where the employment contract was made can apply its own law without violation of the federal full faith and credit clause (*Romero v. Ten Eyck - Shaw, Inc.*, CA Nev. 1968, 400 F.2d 81, cert. den. 89 S.Ct. 629, 393 U.S. 1021, 21 L. Ed. 2 566).

Recognition of the stated humane purposes of the Virginia statute, the emphasis on an employee's welfare, the mandate for liberal construction in an employee's favor, and the concept that the Virginia law was designed as a substitute for common law remedies is deemed to be supportive of the determination that the exclusive provisions of the Virginia statute related to common law and other remedies under Virginia law and were not designed for extraterritorial extension to other sovereign jurisdictions. They do not preclude jurisdiction under District law.

Such a posture is consistent with the propositions that the relief available for permanent total disability under District law is unavailable under Virginia law; that the lesser amounts payable under Virginia law are less advantageous to Claimant than are the larger amounts payable under District policy as expressed in the Act; and that Claimant's execution of the Virginia agreement while hospitalized for surgery is not persuasively reflective of his exercise of an intelligent election of the Virginia remedy in preference to the District remedy.

Findings of Fact

1) On January 22, 1971:

A) Claimant was a resident of the Districtof Columbia.

B) Claimant was an employee of Employer, having entered into an employment contract in the District of Columbia during calendar 1970.

C) Employer was doing business, through employees, in the District of Columbia.

D) Claimant sustained an injury while performing duties for Emplover in Arlington, Virginia.

2) On February 5, 1971, Claimant and Employer executed an Industrial Commission of Virginia Memorandum of Agreeent as to Payment of Compensation, pursuant to which Claimant ws to receive compensation at the rate of $62 per week from and including January 30, 1971, until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia.

3) On March 15, 1971, the Industrial Commission of Virginia issued an Award — Approval of Agreement approving the memorandum of agreement and entering an award of compensation to Claimant, as follows: $62 per week, during incapacity, payable weekly, beginning January 30, 1971; medical benefits awarded for the full statutory period. The award contemplated contingencies and changes set forth in Sections 65.1-54, 65.1-55, 65.1-56, and 65.1-62 of the Virginia compensation law.

4) Payments have been and are being paid and accepted under the award.

5) On October 2, 1974, Office of Worker's Compensation Programs, U.S. Department of Labor, acknowledged receipt of Claimant's September 24, 1974, claim for compensation (for the 1971 injury) under the District of Columbia Workmen's Compensation Act.

Conclusions of Law

1) Claimant is an employee within the meaning of the District compensation act.

2) Employer is an employer within the meaning of the District compensation act.

3) Claimant sustained an injury on January 22, 1971, that falls within the jurisdiction of the Distirct compensation law.

4) A U.S. Department of Labor administrative law judge has jurisdiction to make an award under the Act to Claimant, if the merits of the claim are supportive thereof, for a disability attributable to the January 22, 1971, injury.

Decision

Under the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1), the compensation award made to Claimant under the Virginia Compensation Act is not *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia Compensation Act.

Order

That Claimant and Employer submit medical documentation to the administrative law judge within 30 calendar days after receipt of this Decision and Order.

That Claimant and Employer contact each other and the administrative law judge within 10 calendar days after receipt of this Decision and Order to establish a date for the continuation of hearings in this matter.

/s/ David W. Pelkey
David W. Pelkey
Administrative Law Judge

Dated: September 24, 1975
Washington, D.C.

Supreme Court, U.S.
FILED
JAN 11 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-116

HALLEY I. THOMAS, *Petitioner,*

v.

WASHINGTON GAS LIGHT COMPANY

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1979
CERTIORARI GRANTED NOVEMBER 26, 1979

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1261

WASHINGTON GAS LIGHT COMPANY,
Self-Insured Employer,
Petitioner,

v.

HALLEY I. THOMAS,
Respondent.

Submitted January 18, 1979 — Decided April 27, 1979

On Petition for Review of an Order of the
Benefits Review Board of the United States
Department of Labor

Before BRYAN, Senior Circuit Judge,
WIDENER and HALL, Circuit Judges.

Lewis Carroll, Carl W. Belcher, Douglas V. Pope,
on brief for Petitioner; Lee C. Ashcraft,
Joseph H. Koonz, Jr., James A. Mannino,
James F. Green, on brief for Respondent.

PER CURIAM:

This is a petition by the Washington Gas Light Company (WGLC) to review an order of the Benefits Review Board (BRB) of the United States Department of Labor, awarding Halley I. Thomas compensation benefits in 1974, under the Longshoremen's and Harbor Workers Act, 33 U.S.C. § 902 *et. seq.* (1970 & 1978), as made applicable to the District of Columbia, D.C. Code Ann. § 36-501 (1973 & Supp. IV 1977), after he had sought and obtained an award from the Industrial Commission of Virginia in 1971, under the State's Compensation Act, Va. Code § 65.1-1 *et seq.* (1973 Repl. Vol.). WGLC appeals, moving for a final judgment of reversal, and we grant the motion.

Upon an identical factual premise and corresponding questions of law, we set aside a similar order of the BRB in Pettus v. American Airlines, Inc., 587 F2d 627 (4th Cir. 1978). Consequently, we perceive no reason to hear argument on the appeal.

Reversed.

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

HALLEY I. THOMAS	)	
Claimant-Respondent	)	
v.	)	Benefits Review Board
WASHINGTON GAS LIGHT COMPANY	)	BRB No. 77-182
Self - Insured Employer	)	DECISION
Petitioner	)	

Appeal from the Decision and Order and Supplemental Decision and Order of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Carl W. Belcher, Washington, D.C., for the self-insured employer.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

This is an appeal by the employer from a Decision and Order and Supplemental Decision and Order (76-DCWC-4) of Administrative Law Judge David W.

Pelkey, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §*501 et seq.* (hereinafter referred to as the Act).

On January 22, 1971, the claimant, Halley I. Thomas, was injured in the course of his employment in Arlington, Virginia. Pursuant to an agreement entered into by the parties and approved by the Virginia Industrial Commission, claimant has been receiving temporary total disability benefits from the date of injury except for the brief period between December 27, 1971, and January 3, 1972, when he performed clerical work for the employer.

Claimant notified the deputy commissioner of his intention to pursue a claim for benefits pursuant to the District of Columbia Workmen's Compensation Act on September 24, 1974.

In a preliminary hearing before Administrative Law Judge Pelkey, the employer acknowledged that, but for the Virginia award, the claim would be cognizable under District law. He argued, however, that the Virginia award was res judicata and that a subsequent award under District law would violate the Full Faith and Credit Clause of the United States Constitution. U.S. Const. Art. 4, § 1. The administrative law judge rejected this argument and in an Interlocutory Decision and Order dated September 24, 1975, concluded that the claim was within the jurisdiction of the District of Columbia. Subsequently, in a final Decision and Order, the administrative law judge awarded claimant benefits for permanent total disability from January 22, 1971, an additional ten percent compensation under Section 14(e) of the Act, 33 U.S.C. § 914(e), interest, and an attorney's fee.

Both the claimant and the employer appealed. The employer contended that the Virginia award was entitled to full faith and credit in the District of Columbia;

that Mr. Thomas' claim under the Act was time-barred; and that the imposition of the Section 14(e) "penalty" was not in accordance with law. Claimant contended the amount of the attorney's fee awarded was inadequate.

Following oral argument, the Board granted a motion by the employer to remand the case for the admission and consideration of certain documents bearing on the issues of timeliness and an assessment under Section 14(e). *Thomas v. Washington Gas Light Co.*, ___ BRBS BRB No. 76-180 & 76-180A (Oct. 20, 1976).

In a hearing pursuant to the remand, the administrative law judge determined that the claim was timely filed and computed the amount of additional compensation owing under Section 14(e) of the Act.

The employer appeals raising the same three issues previously before the Board. It also contends that the ad ministrative law judge erroneously failed to consider Section 12 of the Act.

As a preliminary matter, the claimant argues that since the Board's previous decision to remand did not direct consideration of whether the Virginia award is entitled to full faith and credit, the employer is foreclosed from raising this issue in the present appeal. We find claimant's argument is without merit. The Board remanded the case to "complete the record" since, as we pointed out, "the unsatisfactory state of the record . . . precludes the thorough consideration of the issues on appeal which the parties deserve." The record is now complete and we accordingly proceed to consider the merits of the issues raised.

Employer contends that the agreement approved by the Virginia Industrial Commission is the claimant's exclusive remedy under Virginia law and that this agreement is therefore entitled to full faith and credit in the District of Columbia.

In situations where the workmen's compensation law of a state does not contain an explicit prohibition against seeking additional or alternative relief under the laws of

another jurisdiction, the Supreme Court has sanctioned the granting of successive awards, subject to crediting the liable party with amounts paid pursuant to the initial award. *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947); *see also Director, Office of Workers' Compensation Programs v. Boughman*, 545 F.2d 210 (D.C. Cir. 1976). Each state is prima facie entitled to enforce in its own courts its own lawfully enacted Statutes. *Alaska Meatpackers Association v. Industrial Accident Commission of California*, 294 U.S. 532 (1934) In *Pettus v. American Airlines, Inc.*, 6 BRBS 461, BRB No. 77-115 (Aug. 22, 1977), we specifically held that the Virginia statue contains no explicit prohibition which would preclude recovery injuries under the District of Columbia Act. We therefore conclude that it is proper for the District of Columbia to exercise its concurrent jurisdiction in this case.

The employer also contends that Mr. Thomas' claim is time-barred under Section 13(a) of the Act, 33 U.S.C. §913(a), because his claim was not filed until three years after his injury.

Section 30(f) of the Act, 33 U.S.C. § 930(f), tolls the running of the Section 13(a) statute of limitations when the employer having notice or knowledge of the employee's injury fails to file a report as required by Section 30(a) of the act. 33 U.S.C. §930(a). Although the employer does not dispute that it had knowledge of the injury and that it has not yet filed the report required by Section 30(a), it argues that a similar report was filed in Virginia which should be construed as compliance with the Act.

We cannot accept this argument. Regardless of whether the requirements under the Virginia Act are similar to those under the District of Columbia Act, the Board has consistently held that the statute of limitations is tolled by Section 30(f) unless the employer complies with Section 30(a). *Riley v. Eureka Van and Storage Co.*, 1 BRBS 449, BRB No. 74-155 (May 6, 1975). Since no report of injury jury was ever filed under the ACT, we conclude that the

statute of limitations did not begin to run against Mr. Thomas' claim and it is not time-barred.

The employer also contends that it was error for the administrative law judge to assess additional compensation under Section 14(e) of the Act, 33 U.S.C. § 914(e) since the employer made compensation payments pursuant to Virginia law and these payments should be considered full satisfaction for any compensation owed until a claim is filed under the District of Columbia Act. It further argues that the issues it raised in conennection with the employee's claim constitute sufficient compliance with the requirements of Section 14(d) and should operate as a notice of controversion for the period after the filing of the District of Columbia claim.

In *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977) we held that

> Section 14(e) provides for only two exceptions to the requirement of the additional ten percent award: The timely filing of the Notice of Controversion pursuant to Section 14(d) or excuse for nonpayment of compenstion "owing to conditions over which [the employer] had no control."

Jones, supra at 131. Neither the compensation benefits paid pursuant to Virginia law nor issues raised by the employer in connection with the employee's claim are tantamount to filing a Notice of Controversion under Section 14(e) of the Act. Further, the administrative law judge determined that there had been no showing by the employer that, owing to conditions over which he had no control, compensation payments could not have been made. The record clearly supports this conclusion. Since the employer has not brought his case within either of the two exceptions to Section 14(e) set forth in *Jones supra*, we conclude that the award of additional compensation is proper.

The employer's last contention is that it was error for the administrative law judge to fail to consider the ap-

plicability of Section 12 of the Act. 33 U.S.C. § 912. It is argued that the transcript of the August 7, 1975, hearing, the first hearing held before the administrative law judge, shows that the notice requirement under Section 12 was raised as an aspect of the employer's jurisdictional issue. However, it was stipulated at the August 1975 hearing that the only issues in dispute were jurisdiction, nature and extent of disability. whether or not a ten percent penalty, interest and costs should be assessed, and whether the claim was timely. At the end of the hearing, employer did note that it would "submit a brief memorandum of law on the question of jurisdiction, as well as, notice, ten percent penalty. . ." However, this ambiguous statement was not enough to indicate the question of notice under Section 12 was being raised. Moreover, employer did not even mention the notice issue in its post-hearing brief. We can find nothing in the record to indicate that the parties ever changed the issues originally stipulated to include Section 12. In fact, the first and only specific reference to Section 12 is in the employer's brief to the Board in the present appeal. We conclude that Section 12 was not raised before the administrative law judge at the initial or any other stage of the claim and cannot now be raised for the first time on appeal. *Miller* v. *Tacoma Boatbuilding Co.*, _____ BRBS_____ , BRB No. 77-121. (Jan. 23, 1978).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

JULIUS MILLER, Member

I Concur: SAMUEL J. SMITH, Chairman

Dated this 28th day of February, 1978

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	)	
HALLEY I. THOMAS	)	
Claimant	)	
v.	)	
	)	Case No. 76-DCWC-4
WASHINGTON GAS LIGHT COMPANY	)	OWCP No. 40-89630
Employer	)	
SELF-INSURED	)	
Carrier	)	

SUPPLEMENTAL DECISION AND ORDER

In an October 20, 1976, Decision (BRB No. 76-180, 180A), the Benefits Review Board, attending appeals from this administrative law judge's decisions in a September 24, 1975, Interlocutory Decision and a March 4, 1976, Decision and Order (D&O), remanded this matter with directions to the administrative law judge:

> "xxxx to allow the admission and consideration of relevant documents included in the deputy commissioner's file bearing on the issues of the

claim's timeliness and the Section 30 notice requirement under the Act, 33 U.S.C. § 930, and the assessment of additional compensation pursuant to Section 14(e)."

The March 4 D&O awarded Claimant compensation for permanent total disability in connection with a claim therefor under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.*

In compliance with the mandate of the Benefits Review Board, a hearing was held on January 10, 1977. Neither party tendered testimony at that hearing. However, at and prior to the time of the hearing, the parties introduced the following documents into evidence, representing that they were pertinent and material and stipulating that proper disposition was made of the documents within reasonable times after the dates they bear:

A) a February 5, 1971, memorandum of agreement as to payment of compensation under the Virginia workmen's compensation statute;

B) a March 15, 1971, Virginia Industrial Commission approval of the agreement and award of compensation;

C) a September 24, 1974, document constituting Claimant's claim for compensation under the District of Columbia Workmen's Compensation Act (the Act);

D) an October 2, 1974, notice, from the Department of Labor (DOL) to Employer, that Claimant had filed a claim for compensation under the Act;

E) a November 15, 1974 letter, from Employer to DOL, asserting, *inter alia*, that the claim "should be denied" because Claimant failed to file his claim under the Act within one year after the injury;

F) an April 9, 1975, letter from DOL to Employer that, *inter alia*, recommended that payments be made under the Act;

G) an April 14, 1975, letter in which Employer advised

DOL that its recommendation was rejected and in which Employer submitted that it would continue to pay compensation under the Virginia statute;

H) a May 19, 1975, form constituting another claim by Claimant for compensation under the Act, again for the January 1971 injury;

I) a May 22, 1975, notice, from DOL to Employer, that Claimant had filed a claim for compensation under the Act;

J) a June 10, 1975, letter, with which Employer transmitted its Answer, to the May 1975 claim, to DOL;

K) a June 10, 1975, form constituting Employer's Answer to the May 1975 claim;

L a July 11, 1975, memorandum by which the deputy commissioner referred the claim to Office of Administrative law Judges for a formal hearing; and

M) a January 7, 1977, letter by which DOL transmitted specified documents to Employer.

Pertinent provisions relating to whether the claim was filed in a timely manner and the Section 30 notice requirements are:

A) those in 33 U.S.C. 913(a) that state that, a right to compensation for disability shall be barred unless a claim therefor is filed within one year after the injury;

B) those in 33 U.S.C. 930(a) that state that, within 10 days after an injury, an employer shall send the Secretary of Labor and a deputy commissioner a report containing prescribed information relating to the injury; and

C) those in 33 U.S.C. 930(f) that state that, where an employer, specified agent or carrier has knowledge of an injury and fails, neglects or refuses to file the Sec. 30(a) report, the time limitation in Sec. 13(a) shall not begin to run against the claim, or in favor of the employer or carrier, until the Sec. 30(a) report is furnished.

Pertinent provisions relating to the assessment of additional compensation are those in 33 U.S.C. 914(e), relating to instances where payment of compensation installments is required where there has been no award of compensa-

tion . They prescribe that 10 percent thereof shall be added to each installment not paid within 14 days after it becomes due unless:

A) an employer files a prescribed notice, of controversion of the right to payment, with a deputy commissioner within 14 days after acquisition of knowledge of an alleged injury; or

B) a deputy commisioner (or, after referral to Office of Administrative Law Judges, and administrative law Judge) excuses such non-payment after an employer shows that, owing to conditions over which it had no control, the prescribed payment could not be made.

Findings of Fact

A) Claimant did not file his claim under the Act within one year after the injury.

B) Employer had knowledge of the injury on the day it was sustained by Claimant.

C) Employer did not, within 10 days after claimant's injury, file the report required by 33 U.S.C. 930(a) and yet has not filed the report.

D) Employer did not, on or before 14 days after it acquired knowledge of Claimant's alleged injury, file a notice stating that Claimant's right to compensation was controverted, as required by 33 U.S.C. 914(d), and yet has not filed the notice.

E) Employer made no installment payments of compensation under the Act prior to the March 4, 1976, Decision and Order award compensation under the Act.

F) Employer has tendered no showing that, owing to conditions over which it had no control, it could not make installment payments of compensation without an award.

Conclusions of Law

The claim is not barred because Claimant failed to file it within one year of his injury.

Employer was obligated, without an award, to make the first installment payment of compensation, under the Act, 14 days after Claimant sustained his injury, and to make subsequent payments as required by 33 U.S.C. 914(b) until this administrative law judge awarded compensation under the Act.

Employer's failure to make installment payments of compensation without award is not excused.

Decision

Claimant's claim was filled in a timely manner.

Employer is responsible for payment of the additional compensation required by 33 U.S.C. 914(e).

ORDER

To each installment of compensation that was payable without an award and that was not paid within 14 days after it became due, Employer shall add an amount equal to 10 percent of such installment and pay the sum to Claimant.

David W. Pelkey
Administrative Law Judge

Dated: January 21, 1977
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on January 31, 1977 the foregoing Supplemental Compensation Order was filed in the Office of the Deputy Commissioner, District of Columbia District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Halley I. Thomas, 1508 Howard Road, S.E.,
Washington, D.C. 20020
Claimant

Washington Gas Light Company
1100 "H" Street, NW
Washington, D.C. 20005
Insurance Carrier or Employer (if self-insured)

James F. Green, Esq., Ashcraft, Gerel & Koonz,
2101 L Street, NW, Suite 303
Washington, D.C. 20037.

Paul H. Harrington, Esq., 1100 "H" Street, N.W.,
Washington, D.C. 20005.
1100 "H" Street, N.W.
Washington, D.C. 20005

A copy was also mailed by regular mail to the following:

Judge David W. Pelkey, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210.

Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211.

JACK GARRELL
Deputy Commissioner
40th Compensation District U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

HALLEY I. THOMAS Claimant-Petitioner Cross-Respondent v. WASHINGTON GAS LIGHT COMPANY Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party in Interest	Filed as Part of the Record Oct. 20 1976 Susan Rambo Benefits Review Board BRB Nos. 76-180 and 76-180A DECISION

Appeal from the Decision and Order of David W. Pelkey, Administrative law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Carl W. Belcher (Washington Gas Light Company), Washington, D.C., for the employer.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

These appeals are by the claimant and the employer from an Interlocutory Decision and Order (76-DCWC-4), dated September 24, 1975, and a final Decision and Order (76-DCWC-4), dated March 4, 1976, of Administrative Law Judge David W. Pelkey. The claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*,as made applicable to the District of Columbia by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (hereinafter referred to as the Act).

On January 22, 1971, Halley I. Thomas (claimant), a resident of the District of Columbia, was injured in the course of his employment with the Washinton Gas Light Company (employer). The accident occurred in Arlington, Virginia, and claimant has been receiving temporary total disability benefits from the date of injury pursuant to an agreement entered into by the parties and approved by the Virginia Industrial Commission on March 15, 1971.

Claimant notified the deputy commissioner of his intention to pursue a claim for benefits pursuant to the District of Columbia Workmen's Compensation Act in a letter dated September 24, 1974.

Mr. Thomas' claim was referred to the Office of Administrative Law Judges, and a hearing was held to determine whether, under the Constitution's full faith and credit clause, the claimant's compensation award under Virginia law was res judicata to the extent that it precludes a subsequent award of compensation under the District of Columbia Act. In an Interlocutory Decision and Order dated September 24, 1975, the administrative law judge determined that the claim under the D.C. Act was not so barred.

Subsequently, in a final Decision and Order dated March 4, 1976, Judge Pelkey awarded claimant benefits for permanent total disability from January 22, 1971, an additional ten percent compensation under Section 14(e) of the Act, 33 U.S.C. §914(e), interest, and attorney's fee.

The employer appeals contending that the Virginia award is entitled to full faith and credit in the District of Columbia, thus barring the award of benefits under the Act; that Mr. Thomas' claim under the Act is time-barred; and that the imposition of the Section 14(e) "penalty" is not in accordance with law.

Claimant appeals contesting the amount of the attorney's fee awarded by the administrative law judge. Following oral argument on the issues in these appeals, the employer moved to remand this case for the admission and consideration of certain documents not a part of the record before the Board.

The Board has carefully analyzed the entire record in this case, the briefs of the parties, as well as the Motion to Remand submitted by the employer and the response thereto filed by the claimant. We are of the opinion that the unsatisfactory state of the record before us precludes the thorough consideration of the issues on appeal which the parties deserve. Thus, in order to complete the record, we remand this case to the administrative law judge to allow the admission and consideration of relevant documents included in the deputy commisioner's file bearing on the issues of the claim's timeliness and the Section 30 notice requirement under the Act, 33 U.S.C. §930, and the assessment of additional compensation pursuant to Section 14(e).

Accordingly, we remand this case to the Office of Administrative law Judges for further appropriate action consistent with the opinions expressed herein.

Ruth V. Washington, Chairperson

We concur:

Ralph M. Hartman, Member

Julius Miller, Member

Dated this 20th day of October, 1976.

SERVICE SHEET

BRB Nos. 76-180 and 180A:
HALLEY I. THOMAS
v.
WASHINGTON GAS LIGHT COMPANY

A copy of the attached Decision has been sent to following parties:

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Office of Administrative Law Judges
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In the Matter of:	
HALLEY I. THOMAS Claimant	
v.	Case No. 76-DCWC-4
	OWCP No. 40-89630
WASHINGTON GAS LIGHT COMPANY Employer	
SELF-INSURED	

JAMES F. GREEN, ESQ.
Ashcraft, Gerel and Koonz
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Washington, D.C.
For the Claimant

PAUL H. HARRINGTON, ESQ.
1100 H Street, N.W.
Washington, D.C. 20080
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER

As a consequence of Claimant's request for compensation for permanent total disability, a hearing was held on August 7, 1975. At that hearing, the parties made record stipulations of facts and issues, testimony of Claimant and his wife was given, and each party introduced two exhibits into the record. The parties submitted that they did not then propose to tender medical evidence as to the nature and extent of Claimant's injury. Rather, they requested a resolution of Employer's challenge to jurisdiction based on the full faith and credit clause of the United States Constitution (Article IV, Section 1). They proposed that, should there be a finding of jurisdiction under the District of Columbia Workmen's Compensation Act (36 D.C.C. 501, *et seq)*, medical reports would then be incorporated in the records for evaluation.

On September 24, 1975, an Interlocutory Decision and Order issued holding that, under the full faith and credit clause of the United States Constitution, the compensation award made to Claimant under the Virginia Compensation Act is not *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia Compensation Act.

By this reference thereto, the September 24, 1975, Interlocutory Decision and Order is incorporated herein as though fully set forth herein.

On January 16, 1976, the administrative law judge was advised that the parties elected to have no further hearings relating to the merits of the claim and that they proposed to have a decision on the merits based on the then record, as supplemented by documentation to be submitted.

Accordingly, three issues are to be adjudicated herein:

A)Whether, as a result of his January 22, 1971, injury and under District Law, Claimant suffered permanent and total incapacity to earn the wages he was receiving, at the time of the injury, in the same or any other employment.

B)Whether, Employer not having filed the report required by 33 U.S.c. 930(a), 330 U.S.C. 930(f) has tolled the running of the period set forth in 33 U.S.C. 913(a) for filing a claim for compensation so as to render Claimant's September 1974 claim timely for his January 1971 injury.

C)Whether, if an award is payable under District law, Employer should be charged with payment of additional 10 percent amounts under 33 U.S.C. 914(e), interest, costs, and attorney's fee.

Statement of the Case

On February 17, 1976, the administrative law judge received medical reports from Claimant's attorney representing joint submissions by the parties. On the basis of the date of the first, or only, submission by each doctor, the essential substance of each report is set forth hereafter.

A Dr. Henesy reported that a January 22, 1971, X-ray examination of Claimant revealed no evidence of injury or disease of the lumbosacral spine.

A January 23, 1971, report was the first of 16 reports submitted by Dr. Cooney, a neurological surgeon. It reflected a history given by Claimant that referenced the January 22, 1971, injury. Reportedly, Claimant complained, chiefly, of acute back pain; additionally, there was a report of mild back discomfort. As a result of his examination, the doctor was of the impression that an acute lumbosacral strain had been experienced. He recommended traction, physical therapy and medication.

On February 18, 1971, the doctor noted Claimant's failure to respond to conservative therapy, performance of a myelogram that revealed protrusion to the left of an L4 central disc, February 8 disc surgery, and discharge to be followed as an outpatient.

A March 5, 1971, report was occasioned by Claimant's development of discomfort in the low back and left hip. Examination revealed limited motion in the lumbosacral

spine and muscle spasms. Claimant was considered yet to be "temporarily totally disabled." Home use of analgesics, muscle relaxants and moist heat was prescribed.

On April 15, 1971, the doctor noted Claimant's rehospitalization on March 9, traction treatment, myelogram revelation of defect at L4-L5 level, nerve root decompression on March 26, and discharge, free of pain, to be followed as an outpatient. Final diagnosis; ruptured disc at L-4.

An April 23, 1971, report reflected improvement but occasional discomfort in the low back and leg. Noting that Claimant was still totally disabled and recovering from surgery, the doctor recommended medication, when necessary, and another visit in one month.

A month later, May 21, Claimant's complaints were reported as unchanged. He was found still to be symptomatic following surgery. Longer use of a back support, rest and medication were recommended for the then still totally disabled patient.

A July 14, 1971, report noted June 2 hospitalization for persistent left leg pain, tests resulting in a consensus among four physicians that Claimant had neuritis, July 3 discharge for home rest and mild analgesics, and contemplated surgery absent lessening of symptoms.

On August 4, 1971, the doctor reported Claimant's rehospitalization on July 12 because of "the intractable nature of his left leg pain", July 22 surgery that included a sensory rhizotomy of the L5 root and spinal fusion, August 31 discharge without leg pain, and, while still totally disabled, future observation as an outpatient.

A September 1, 1971, document indicated that Claimant was "recovering nicely from his complicated case," that he was given medication to facilitate sleep, and that another visit was scheduled for follow-up one month later.

On October 11, 1971, the doctor acknowledged Claimant's complaints of occasional pains in the low back and left leg, and noted advice that Claimant "avoid sitting as much as possible" and return in one month.

Claimant was reported, on November 8, 1971, to be do-

ing "fairly well" while complaining of occasional low back and left leg pains and expressing anxiety to return to some form of work. More than three months having passed since surgery, the doctor opined that he could perform light duty and return for examination in six weeks.

On December 6, 1971, the doctor noted development of severe pain behind the left knee and mild low back pains. Because Claimant had not yet returned to work, a 10-day medication program was scheduled to precede a determination of his ability to return to "light duty."

A January 12, 1972, report reflected Claimant's ability to work but " a few days" because of persistent pain behind the left knee, continued total disability, prescription of medication, and a scheduled evaluation one month later.

Claimant's condition on March 8, 1972, was essentially unchanged. The persistent sciatica was attributed to adhesions about the nerve root which, the doctor opined, might require a long time to subside. Although total disability remained, no need was seen for further studies.

Approximately 10 months later, on January 12, 1973, the doctor noted that Claimant's left leg pain had persisted and that mild low back pain had recently reappeared. He submitted that Claimant had "significant" residuals of his ruptured disc and assessed a 35 percent permanent disability.

On November 7, 1975, the doctor noted that Claimant had been seen by a Dr. Rizzoli and that the patient reported an inability to work because of back and leg discomfort. He again assessed a 35 percent permanent partial disability attributable to residuals of the ruptured disc.

A Dr. Harrell submitted a May 28, 1971, report to the Industrial Commission of Virginia. It referenced the January 22 accident; diagnosed acute lumbosacral strain and a ruptured disc at L4-L5; and recommended treatment by traction, physical therapy, medication, hospitalization and operation. The report indicated that the physician had seen Claimant on the day of the accident. The doctor also submitted an August 8, 1971, report in which he referenced surgical procedures on February 8 and March 26, 1971, and indicated the possibility of future surgery. He submitted that it was questionable that Claimant would again be "a useful employee in the T&D Department."

One Dr. Collins submitted a January 18, 1972, report reflecting a July 13, 1971, examination of Claimant following two surgical experiences. An examination resulted in a finding of recurrent nerve root irritation and flexion contracture of the left knee. He recommended spinal fusion of L4 to the sacrum. Office visits on August 31, October 8, November 5, and December 17, 1971, followed the recommended surgery. On the date of the last visit Claimant was no longer reporting back pain, but he continued to report occasional pain around the left thigh that was concentrated at the back of the left knee. The doctor recommended reduced use of the back brace Claimant had worn since the surgery.

A Dr. Rizzoli, a neurological surgeon, submitted the first of five reports on February 6, 1973. At that time, Claimant complained of low back and left leg pain. After an examination, the doctor had the impression that Claimant had residuals of ruptured lumbar disc disease. He recommended electrical studies of and physiotherapy to the left leg along with spine studies. He foresaw possible need for another myelogram. By a February 20 addendum to the report, he opined that Claimant had a 50 percent permanent partial disability.

The doctor's second report, on March 22, 1973, noted hospitalization between February 27 and March 22, 1973. During that time, surgery was discussed but not recommended. Conservative treatment was given and recommended for the future with a review of the condition after one month. At that time, the doctor believed that Claimant was unable to return to work.

A third report, dated April 23, 1973, revealed unchanged complaints. The doctor noted improvement in that a right leg problem, one that was considered during hospitalization, had disappeared. However, he still did not feel Claimant could return to work.

The doctor's September 25, 1973, report reflected unchanged complaints. After examination, he felt that further surgery was not then indicated. He recommended medication to facilitate sleep.

The surgeon's last report was dated June 11, 1974, and noted unchanged complaints. The doctor recommended against further surgery. He recommended pain and sleep medication. He reported having advised Claimant to seek occupational rehabilitation and "another form of employment."

A Dr. Chiu forwarded Dr. Rizzoli a February 13, 1973, report of a February 9 examination oriented to rehahilitation. On the basis of partial denervation at L5-S1 root and chronic irritation of an adjacent root, the doctor proposed a program of physical therapy and reevaluation after two weeks.

A February 26, 1975, examination of Claimant by a Dr. Smith was the basis of a report reflecting complaints of progressively severe pain in the low back and left leg. After examination, the doctor felt that Claimant exhibited residuals from lumbasr disc disease and multiple surgical procedures. He saw no indication of a need for further surgical procedures, but recommended analgesics and physical therapy. The doctor concluded his report with the statement that Claimant "will reconsult this office as need be for his symptoms."

The last report made of record was the January 9, 1976, report of Dr. Schuster, an orthopedic surgeon. It was based on a December 22, 1975, examination, prior to which Claimant complained, chiefly, of pain in his low back that radiated down the left leg. A history of a January 1970 injury was recited that paralleled Claimant's history after his January 1971 injury. On the basis of his examination, the doctor diagnosed residual instability of the spine and residual sciatic radiculitis on the left side. The orthopedist opined that the back problem began with the "injury of January 1970" and that Claimant then (January 1976) did not have solid fusion in the spine. He found Claimant to be unable to perform" any type of heavy manual labor"

and he assessed a permanent 50 percent partial disability of the body as a result of the spinal problem. He forecasted a need for additional surgery to reexplore involved areas and to reinforce the spinal fusion.

Discussion

Medical documentation submitted by the parties is considered to be sufficiently substantial to support the determination that, as a result of the January 22, 1971, injury, Claimant has suffered a permanent and total loss of capacity to earn the wages he was receiving at the time of the injury.

When examined in connection with other medical evidence of record, Dr. Henesy's finding is considered to be of no persuasive value.

Dr. Cooney's reports through October 11, 1971, are read as depicting a total disability under the Act. His November 8, 1971 report suggests a condition that will tolerate "light" duty, but succeeding reports through March 8, 1972, again reflect total disability. The reports of January 1973 and November 1975 make no reference to ability to work, but reflect a medical disability rated at 35 percent. In view of the fact that the reports reflect that, between January 1971 and November 1975, Claimant experienced disability in spite of extensive medical care and treatment, it is considered reasonable to conclude that, medically, the disability is permanent in nature.

As early as August 1971, Dr. Harrell, a professional who is acquainted with Claimant's job requirements, questioned Claimant's future ability to resume the job requirements performed at the time of the injury.

Dr. Collins' January 1972 opinion that Claimant's recovery progress required monitoring is not read as one recognizing a capacity to perform hard manual labor.

In February 1973, Dr. Rizzoli found a permanent medical disability rated at 50 percent. In June 1974, he recommended occupational rehabilitation and an attempt

to find another "form" of employment. Such is interpreted as being reflective of an opinion that Claimant was then permanently without capacity to perform work such as he performed for Employer at the time of the injury.

Dr. Chiu's opinion that there was need for physical therapy attending a nerve condition is not considered to be one reflecting a capacity for manual labor.

The report of Dr. Smith, an associate of Dr. Rizzoli, is read as reflecting a condition that is not subject to medical or surgical correction. It is reflective of the presence of a disability that Claimant will have to experience with hope, at best, of alleviation of symptoms of discomfort.

Dr. Schuster's January 1976 opinion that, medically, Claimant has a 50 percent permanent disability that may require future surgery is read as decriptive of a condition that will not accommodate hard manual labor.

Furthermore, testimony at the hearing, uncompromised and minimally challenged, reflects a condition of permanent total disability under the Act. Observation of the Claimant during the hearing buttresses the testimony.

All of the foregoing has been evaluated in connection with the following propositions:

A) A finding of permanent disability is not precluded by a medical prognosis that an employee is likely, at some indefinitive future date, to get better and to be able to return to work *(Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649 (CA5, 1968).

B)Disability should be evaluated in economic, rather than in medical, terms *(Owens* v. *Traynor,* 274 F. Supp. 770; affirmed 396 F.2d 783; certiorari denied 89 S. Ct. 401, 393 U.S. 962, 21 L. Ed. 2d 375.

C) Under the Act, the ability to earn is the test of the right to compensation *(United Engineering Co.* v. *Pillsbury,* 92 F. Supp. 898; affirmed 187 F.2d 987; affirmed 72 S.Ct. 223, 342 U.S. 197, 96. L.Ed. 225).

In connection with all of the foregoing it is concluded that, as a result of the January 22, 1971, injury, Claimant has permanently and totally lost the capacity to earn the wages he was receiving, at the time of the injury, in

employment by Employer or in any other employment.

The record reveals that, in spite of the fact that Claimant sustained injury on January 22, 1971, his September 25, 1974, filing of his claim under the Act was timely. Employer did not address the matter on brief. Claimant, on brief, accurately submitted that Employer had knowledge of the injury on the date it was sustained and that, on the date of the hearing, had not filed the report required to be filed by 3 U.S.C. 930(a). Too, Claimant accurately submitted that, whereas 33 U.S.C. 913(a) bars a claim unless it is filed within one year after an injury, 33 U.S.C. 930(f) provides that the one year period of limitation does not begin to run against the claim until the report required by 33 U.S.C. 930(a) has been filed. The record supports the conclusion that the one year statute of limitation had not begun to run on September 25, 1974.

The record does not contain sufficient evidence to enable the administrative law judge to determine whether the additional 10 percent payment required under 33 U.S.C. 914(e) must be applied to the first, or any succeeding, installment payment made by Employer. Consideration of 33 U.S.C 914(b) and (e) reveals that Employer should have made the first installment payment by February 19, 1971. The date of first payment or any succeeding payment does not appear of record. The record only reflects that as of February 5, 1971, Employer and Claimant executed a written agreement that compensation under the Virginia statute would be paid from January 30, 1971.

On brief, Claimant accurately submitted that Employer filed no notice of controversion complying with the requirements of 33 U.S.C. 914(d). Additionally, the record contains no evidence that Employer sought excuse for untimely payment(s) on the basis that timely payment of any installment could not be made because of conditions over which Employer had no control.

Accordingly, the administrative law judge can but determine that, as to any installment of compensation, payable without award, that was not paid when due, Employer is

obligated pay Claimant an additional amount equal to 10 percent of the amount of any such installment.

On February 17, 1976, the administrative law judge received Claimant's petition requesting award of attorney's fee. In the petition, Claimant's attorney submitted that he has represented Claimant since July 1973. For the purpose of determining the amount of the fee to be awarded, the submission is not accepted. Documentation submitted by Claimant indicates that the attorney/client relationship attached to this claim on or about September 24, 1974. For this reason, and because the attorney's specifications of services rendered are identified neither by dates nor time frames, much is left to be desired in the form of assistance to the administrative law judge during his evaluation of the petition.

Counsel solicited consideration of the knowledge and experience of his firm in effecting an award of a fee. Such has been considered, and recognition has been accorded the proposition that the claim presents an uncomplicated factual situation. The foregoing, coupled with the background and experience of the administrative law judge, have rendered certain elements of the fee petition unacceptable. Commitments of time for purposes listed below are determined to be excessive.

A) 14 hours for client interviews and preparation for hearings. Reasonably, such could have been accomplished in 9 hours.

B) 18.5 hours for consultations with representatives of Employer and the Department of Labor. Reasonably, such could have been accomplished in 8 hours.

C) 37 hours for research. No more than 24 hours (3 days) were reasonably required to research matters involved herein.

D) 2.5 hours to prepare and submit final documentation. The product submitted reasonably required no more than an hour.

Accordingly, allowance of a fee for 46.5 hours of services rendered Claimant herein, at the hourly value counsel placed on his services, is determined to be

reasonable. Award of a fee totalling $1,860.00 is hereby made and approved.

Finding Of Fact

As a result of the January 22, 1971, injury, Claimant has permanently and totally lost the capacity to earn the wages he was receiving, at the time of the injury, in employment by Employer or in any other employment.

Conclusion of Law

As a result of the January 22, 1971, injury and since that date, Claimant has been rendered permanently and totally disabled.

Decision

As a result of a January 22, 1971, injury, Employer is obligated to pay Claimant compensation for permanent total disability from January 23, 1971.

The claim is not barred because of Claimant's failure to file his claim within one year of January 22, 1971.

As to any installment of compensation, payable without an award, that was not paid when due, Employer is obligated to pay Claimant an additional amount equal to 10 percent of the amount of any such installment.

Order

That Employer pay Claimant compensation for permanent total disability, beginning January 23, 1971, based on average weekly wages totalling $114.67.

That Employer deduct, from amounts due and payable under this Decision and Order, any amounts paid to Claimant, for the January 22, 1971, injury, under the Virginia Compensation Act.

That, as to any installment of compensation that was required to be, but was not paid within 14 days after it became due, Employer pay Claimant an additional amount equal to 10 percent of any such installment.

That, as to any installment not paid when due, Employer pay Claimant interest an annual rate of 6 percent until date of payment.

That Employer pay James F. Green, Esq., $1,860.00 for services rendered Claimant herein.

David W. Pelkey
Administrative Law Judge

Dated: March 4, 1976
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on *March 5, 1976* the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, *District of Columbia* District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:
Mr. Halley I. Thomas, 1508 Howard Road, S.E., Washington, D.C. 20020
Claimant

Washington Gas Light Company, 1100 "H" Street, N.W. Washington, D.C. 20005
Insurance Carrier or Employer (if self-insured)
James F. Green, Esq., Ashcraft, Gerel and Koonz, 925 - 15th Street, N.W. Wash., D.C.
Paul H. Harrington, Esq., 1100 "H" Street, N.W. Washington, D.C. 20080

A copy was also mailed by regular mail to the following:

Judge *David W. Pelkey*, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210
Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite

N-2716, NDOL, Washington, D.C. 20210
Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211

JACK GARRELL
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs.

Form LS–19
Rev. Aug. 1975

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

In the Matter of:	:	
HALLEY I. THOMAS *Claimant*	:	
	:	Case No. 76-DCWC-4
v.	:	OWCP No. 40-89630
WASHINGTON GAS LIGHT COMPANY *Employer*	:	
SELF-INSURED	:	

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Washington, D.C.
For the Employer

PAUL H. HARRINGTON, ESQ.
1100 H Street, N.W
Washington, D.C. 20080
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

INTERLOCUTORY DECISION AND ORDER

Claimant seeks compensation for permanent total disability from January 21, 1971, additional 10 percent payments under 33 U.S.C. 914[e], fees and costs under 33 U.S.C. 928, and 6 percent interest on unpaid installments of compensation, under the Longshoremen's and Harbor

workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.* Hereafter, those acts are cited as the Act. This Decision and Order follows an August 7, 1975, hearing that was conducted in accordance with 5 U.S.C. 554. At that hearing, the parties represented that they had reached agreements as to issues to be adjudicated and as to facts to be taken as admitted. Those agreements, framed as stipulations, follow:

Stipulation of Issues to be Adjudicated

Whether, under the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1), the compensation award made to Claimant under the Virginia Compensation Act is *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia (District) Compensation Act.

Whether, as a result of his January 22, 1971, injury and under District Law, Claimant suffered permanent and total incapacity to earn the wages he was receiving, at the time of the injury, in the same or any other employment.

Whether, Employer not having filed the report required by 33 U.S.C. 930(a), 33 U.S.C. 930(f) has tolled the running of the period set forth in 33 U.S.C. 913(a) for filing of a claim for compensation so as to render Claimant's September 1974 claim timely for his January 1971 injury.

Whether, if an award is payable under District law, Employer should be charged with payment of additional 10 percent amounts under 33 U.S.C. 914(e), interest, costs, and attorney's fee.

Stipulation of Facts to be taken as Admitted

Claimant's January 22, 1971, injury arose out of and in the course of his employment by Employer.

On January 22, 1971, an employer/employee relationship existed between the parties.

At the time of injury, Claimant's average weekly wages was $114.67.

But for the period from December 27, 1971, through January 3, 1972, Employer has paid and continues to pay compensation for total disability under the Virginia Compensation Act since the date of the injury.

Employer has paid $57 for physical therapy treatments given to Claimant since the injury.

At the opening of the hearing, the parties submitted that they did not then propose to tender medical evidence as to the nature and extent of Claimant's injury. They expressed the desire that the administrative law judge, initially, issue a Decision and Order resolving Employer's full faith and credit/ *res judicata* challenge to jurisdiction under District law. They stipulated that, if there be a finding of District jurisdiction, all treating physicians' reports will be introduced into the record. Additionally, they stipulated that Claimant has the right to get a medical report and evaluation from an "independent" physician to be selected by Claimant and that Employer has the right to submit observations on such report and evaluation. The procedural plans were adopted by the administrative law judge.

Statement of the Case

Claimant was the first witness. He stated that he was 32 years old, married, the father of one child, possessor of an 11th grade education, and a resident of the District since 1949. The witness said that Employer's main office is in the District and that he was employed by Employer at its District employment office in January 1970. He represented that he began employment as a custodian (building cleaner), a job similar to one he had held in the past, but one for which he had no other training. At the time of his injury, he had become one of Employer's laborers, and was involved in repair of pipes Employer placed in streets. For such work, he had no special training; it required use of jackhammers, picks and shovels. Prior to his injury, approximately 60 percent of his work had been in the District, 20 percent had been in Virginia and 20 percent in Maryland.

The witness testified that, on the day of the injury, he had been working in Virginia, out of a Virginia office of Employer, for approximately two months. During that period, he was paid by checks drawn on a District bank and he could be, and was, recalled from time to time to work in the District. (Employer stipulated that Claimant could be "fired" by the Employer's District office while he was assigned to work in Virginia).

Claimant said that, the day he was injured, he was using 35-pound and 95-pound jackhammers to break concrete. He bent over while using a 35-pound hammer and was unable to straighten up. His foreman was called and he was taken to the District where he was examined by Employer's nurse and sent to a physician selected by Employer. On that same day, Claimant was hospitalized.

Successively, he was operated on for a ruptured disc, released to go home after approximately 28 days, hospitalized for surgery to remove disc fragments, released, hospitalized without surgery, released, hospitalized for a third operation, released, and hospitalized for a fifth time without surgery in May 1973. During those experiences, and successively, he was attended by three physicians. He has been under care of the third physician since the last hospitalization, on a need-for-relief-from-pain basis, and last visited that doctor's office in April 1975. He has also had a short period of physical therapy treatment that was paid for by Employer.

Claimant represented that he has experienced pain in the back area at regular and frequent intervals since the injury. As of the date of the hearing, he indicated, he was unable to sit for a long period of time, to maintain one position for a long period, to be flat on his back, or to lie on his stomach. He said that his doctor has told him not to drive a car, mow a lawn or lift more than 11 pounds.

He said that from December 27, 1971 through January 3, 1972, as a result of Employer's offer, he performed filing duties in one of Employer's offices. Pain prevented him from doing the sitting and bending required for such work and, on the latter date, Employer's nurse sent him home. He has not worked since January 3, 1972. Since that date, Employer has offered him no work and he has sought no other work. He submitted that he has sought no work because of his physical condition. He proposed that he did not know what work he can do and that, if Employer would not hire him, no employer would hire him. He expressed the belief that his health has rendered him unemployable. Claimant noted that Employer has paid disability compensation under Virginia Law (but for the short period he worked) since the injury and that he now receives total disability compensation under the Social Security program.

Claimant's wife testified that Claimant has appeared never to be free of pain since the injury. She noted that his condition limits his capacity to work around the house and to engage in physical activity with his child. She stated that she has observed no indication that time has resulted in a reduction of severity or frequency of pain experienced by her husband.

Each party made documentation part of the record. Claimant's exhibits were: A) a copy of a September 24, 1974, notice, to the Department of Labor, of a claim for benefits, under the District Compensation Act, arising out of a January 20, 1971, injury in Arlington, Va; and B) a copy of an October 2, 1974, letter from the Department of Labor to Employer suggesting that the injury was covered by the Act and asking Employer's opinion relative thereto. Employer's exhibits were: A) a copy of a February 5, 1971, Memorandum of Agreement as to Payment of Compensation, signed by Claimant and Employer, covering compensation payments under the Virginia Workmen's Compensation Law, and B) a copy of a March 15, 1971, Industrial Commission of Virginia Award approving the referenced agreement.

Discussion

On brief, Employer challenged jurisdiction by discussing the following propositions: A) whether, under the full faith and credit clause, the Virginia compensation award bars an additional award under District law; and B) whether, by its terms, the Virginia compensation statute precludes a District award after an award has been made under the Virginia Statute. Employer acknowledged that, but for the Virginia award, the instant claim would be cognizable under District law.

A lesser portion of the brief was devoted to the first proposition. In connection therewith, Employer submitted that Claimant's Virginia award had become final. By reason thereof, the full faith and credit concept precluded District assumption of jurisdiction to enter another award. In support of the position, Employer cited so much of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208 (December 20, 1943), as indicated that an employee, seeking a compensation award in a second state after having received a prior award in another state, may be faced with a full faith and credit consideration.

A larger portion of the brief was devoted to the second proposition. In connection therewith, Employer submitted that the language of the Virginia statute and Virginia Court decisions indicate, in the statute, a "clear intent" to preclude subsequent recovery of benefits in another jurisdiction after receipt of compensation under the Virginia statute.

Employer referenced so much of Section 65.1-40 of the Virginia law as provides that rights granted under the statute, when accepted, "shall exclude all other rights and remedies xxx at common law or otherwise." The language of the provision was said to be "all inclusive" and, because Employer found no Virginia Court decision

limiting the effect of the language, its "plain meaning" (as expressed by Employer) should control in a determination of legislative intent. The representation that there is a "plain meaning" of the language is unpersuasive. Extensive litigation involving similar statutory provisions, coupled with Employer's failure, to ascribe a meaning to the language by Virginia courts, persuasively indicates that the language has no "plain meaning." The quoted statutory language reasonably can be read to relate to the exclusion of all other rights under Virginia common law and to the exclusion of all other remedies otherwise provided by Virginia statutes.

Employer submitted that the "other rights" excluded by the statute include the right to seek the award sought by Claimant under District law. The submission is not supported by the *Magnolia* statement that a state is without power to give extraterritorial effect to its laws. Too, absent convincing evidence to the contrary, such "other rights" reasonably can be read to relate to rights under Virginia law. Finally, absent a convincing legislative statement of such intent, no justification appears for reading the collective mind of the Virginia legislature as having intended to enact a law that has the extraterritorial effect of depriving another state of jurisdiction over a matter in which the other state has a legitimate interested.

Employer submitted that "or otherwise" refers to rights not previously existing under the common law, and would include the right to receive compensation benefits under the law of a jurisdiction other than Virginia. Here, again, Employer adopted the extraterritorial posture referenced earlier. Reasonably, in the phrase "at common law or otherwise," the latter two words are readable as applying to a Virginia statutory enactment such as a wrongful death statute.

Employer cited *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2 530 (1942), and *Humphries v. Boxley*

Bros., Co., 146 Va. 91, 135 S.E. 890 (1926), to support its position that the Virginia statute was designed to exclude an award in another state after an award is made in Virginia. Examinations of those decisions reveal that they dealt with Virginia's compensation law *vis-a-vis* the Virginia common law action for damages; those decisions were not concerned with an extraterritorial thrust of the statute. Accordingly, they are not considered to be appropriate for application to the instant situation.

Employer cited *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622, 67 S.Ct. 886 (March 31, 1947), for the proposition that only unmistakable language in one state's statute should be construed as precluding compensation proceedings under another state's statute and proposes that the language in the Virginia statute is so unmistakable.

On brief, Claimant also addressed the full faith and credit concept from award and statutory language approaches. Relative to the Virginia award, Claimant submitted that, were it recognized as a bar to a District award, violence would be done to the ruling in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S. Ct. 801 (March 10, 1947). The submission is rejected. No award was involved in *Cardillo*. Claimant also submitted, without elaboration, that, as a supplement to the Virginia award, a District award would not violate the concept if amounts paid under the Virginia award were credited to Employer under a District award.

In addressing the exclusive character of the language of the Virginia statute, Claimant cites the *McCartin* requirement of unmistakable language by a state legislature to support the exclusion of an additional award in another jurisdiction. Claimant submits that the language in the Virginia statute is comparable to the statutory language involved in *McCartin*. The language in *McCartin* was not found to be so exlcusive as to

preclude an additional award. Claimant proposes that the Virginia language is not so exclusive as to preclude an additional award under District law.

Disposition of the jurisdictional challenge dictates consideration of the full faith and credit clause (U.S. Const., Art. IV., Sec. 1) and a statute implementing the clause. In pertinent part, Article IV provides that each state shall give full faith and credit to the public acts, records, and judicial proceedings of every other state. 28 United States Code 687 provides, in pertinent part, that every court in the United States must give such faith and credit to a state's act, record or judicial proceeding as is given that act, record or judicial proceeding (by law or usage) by the courts of the state in which the act, record or judicial proceeding was taken.

That compensation awards have been treated as judgments, for purposes of *res judicata*, is established by court treatment of such awards. In *Magnolia*, the court found that, under Texas law, a compensation award that has become final is entitled to the same faith and credit as a judgment of a court, In *McCartin*, the court found that, under Illinois law, a compensation award is *res judicata* on matters adjudicated and agreed upon therein. For purposes of *res judicata*, a United States District Court has treated an award under Virginia law as a judgment (*Perrin v. Brunswick Corp.*, D.C., W. D. Va., November 5, 1971, 333 F. Supp. 221). The U.S. Supreme Court treated the Virginia compensation law in *Dillard v. Virginia Industrial Commission*, 416 U.S. 783, May 15, 1974, and held, *inter alia*, that: A) if an award is not timely challenged, it is conclusive until changed by the Commission; and B) in a ministerial capacity, a Virginia court will enforce an award. Accordingly, it is concluded that, in the instant matter, Claimant's award under the Virginia compensation law must be given such faith and credit in the District as it is given in Virginia; that, to the extent that the Virginia award is *res judicata* in Virginia, it is *res judicata* in the District.

Employer proposes that *Magnolia* supports the submission that, because there was *an* award under Virginia law that was coupled with payment and acceptance of payment thereunder, the full faith and credit clause bars *any* award under District law; that, as *res judicata*, the terms of the *specific* Virginia award bars *any* award under the District law. Such a proposal is acceptable if the Virginia award precluded any further award under Virginia law. If the Virginia award did not preclude a further award of compensation in Virginia, the proposal is not acceptable.

The decision in *Magnolia* supports the imposition of the conditions placed upon the acceptability of Employer's proposal. In controlling part, *Magnolia* held that, to the extent that the Texas award was *res judicata* in Texas, it was *res judicata* in Louisiana. The court found that: A) by its terms, the Texas award (constituting "full compensation for his injury") was a conclusive determination, betwen the parties, that the employer should be liable to the employee, relative to the injury, for no more than the amount of the Texas award; B) under Texas award and law, the employee was precluded from receiving any compension in Texas that exceeded the amount of the award; C) because the Texas award was a bar to any further recovery of compensation in Texas, it was under the full faith and credit concept, a bar to the further remedy under Louisiana law; and D) Louisiana was without power to deny that the Texas award had the same binding effect on the parties in Louisiana as it had on the parties in Texas. Significantly, the essence of the *Magnolia* decision is read to be that, because *the* terms of *the* Texas award precluded further compensation in Texas, they precluded further compensation in Louisiana. Significantly, there is an absence of a holding that, becuase there had been *an* award in Texas, *a* further award in Louisiana was precluded.

Claimant submits that *Magnolia* does not support Employer's proposal because the ruling therein was

distinguished in the Surpeme Court's ruling in *McCartin* by the finding that the *McCartin* clause did not specifically preclude recovery in other jurisdictions. Claimant submits that the *Magnolia* clause was found to be so exclusive.

In *McCartin*, as similarly in *Magnolia*, the court held that, to the extent that the Illinois award was *res judicata* in Illinois, it was *res judicata* in Wisconsin. The court found that: A) by its terms, the Illinois award determined the total amount the employer was required to pay the employee under the Illinois compensation law; B) by its terms, the Illinois award did not affect any rights that the employee may have had under Wisconsin law C) the actions of the Illinois Industrial Commissioner in approving an agreement and effecting the award containing a reservation of right under Wisconsin law, reflected the fact that, under Illinois law, a *McCartin-type* award did not preclude an additional award under the law of another state; and D) rather than having been intended as conclusive of all rights to compensation arising out of the injury, the award was determinative of compensation payable under Illinois law and not determinative of compensation subsequently payable under Wisconsin law. Significantly, the essence of the *McCartin* decision is read to be that, because *the* terms of *the* Illinois award recognized and preserved the employee's right to pursue a subsequent remedy under Wisconsin law and did not preclude attempts to obtain further compensation under Wisconsin law, the award was not *res judicata* as to any amount of compensation that might be payable for the injury under Wisconsin law. The court found that the award was *res judicata* only as to the amount the employer had to pay the employee under Illinois law. The court noted that it found nothing in Illinois law or decisions under it that was designed to preclude recovery in Wisconsin.

On the basis of the foregoing, it is concluded that *McCartin* and *Magnolia* reflect the court's application of one legal principle to two factual situations.

Attention is now directed to consideration of the extent to which Claimant's March 15, 1971, Virginia award is *res judicata* in Virginia. By its terms, the award required payments, as follows:

A) During "incapacity," payments at a $62 weekly rate, beginning January 30,1971.

B) *If* the incapacity exceeded six weeks, Claimant was to be paid such amounts "as *may be* awarded" (underscoring supplied) for partial incapacity of any members of the body except those covered by the "schedule loss" provisions of the compensation law. (The payments, subject to a set minimum amount, were to be based on Claimant's average weekly wages before his injury and the wages he was able to earn after the injury; they were not to exceed $62 weekly for 500 weeks).

C) In addition, if the partial incapacity involved members covered by the schedule loss provisions of the statute, Claimant was to be paid the dollar amounts for the time periods specified by those provisions and the state commission was to be so advised.

D) Further in addition, if total incapacity, as distinguished from total and permanent incapacity, exceeded six weeks, Claimant was to be paid (subject to express minimum and maximum amounts) a stated percent of his average weekly wages for not longer than a specified number of weeks. For total and permanent incapacity (statutorily defined as loss of both hands, arms, feet, legs, eyes, or any two thereof, total paralysis, or brain injury resulting in incurable imbecility or insanity, such payments were to be made without limitation as to time, with advice to the commission.

An examination and evaluation of the terms of the Virginia award are determined to be supportive of the conclusion that it was in the nature of an "open end" award. It effected definitive and specific provision for payment of compensation only if the initial incapacity

lasted six weeks and it covered only those six weeks. It was designed to provide for such periods and natures of incapacity that might mature and to pay compensation only during the period(s) that Claimant might be involuntarily unemployed due to injury. The award did not effect a final settlement of the rights and liabilities of the parties. Rather, by its terms, it contemplated further awards.

Further, Virginia Supreme Court of Appeals held, in *Griffith v. Raven Red Ash Coal Co.*, 20 S.E.2 530, June 8, 1942, that an essential of *res judicata* is that the issue raised in a second suit must be identical with the issue, or one of the issues, raised and determined in the first suit. In the instant matter, the issue is whether Claimant is entitled to compensation for permanent total disability under District law. In the Virginia compensation proceeding, the issue was whether Claimant was entitled to compensation for what was then to be determined as no more than a temporary total disability. The issues are not considered to be identical.

Still further, Virginia courts have indicated that, after an award and during the whole compensation period applicable to the injury in question, the relation of the Virginia Commission to the award is that of a court to a judgment during the term at which it was rendered. (*American Mutual Liability Insurance Co. v. Hamilton*, 135 S.E. 21, 145 Va. 391 (1926); *Old Dominion Land Co. v. Messick*, 141 S.E. 132, 149 Va. 330 (1928). The propositon that a judgment is not a final determination until the end of "term time" is so widely accepted as to render citation of support thereof unnecessary.

Yet still further, a ruling by a court in Wisconsin, a pioneer state in workmen's compensation legislation, is persuasive. In *Spietz v. Industrial Commission*, S.Ct. Wis, 28 N.W.2 354, 251 Wis. 168 (July 1, 1947), a Wisconsin resident was given a Montana award of $17 per week, for not to exceed 300 weeks, for temporary total disability; payments were to continue if there be permanent partial

disability. Subsequently, an award was made under Wisconsin law. The court held that the award was not final as to partial disability, if any, when the temporary total disability terminated. The Montana award was not *res judicata* so as to preclude the Wisconsin award. The concept stated in *Spietz* is adopted herein.

In view of the foregoing, it is determined that, because the Virginia award was not a bar to further recovery of compensation in Virginia, it was not, under the full faith and credit concept, *res judicata* as a bar to further recovery of compensation under District law.

Employer submits that the provision in the Virginia compenstion statute that makes an employee's rights thereunder exlusive of all others, "at common law or otherwise," precludes assumption of jurisdiction under District law. The submission is deemed to be inconsistent with an interpretation, by the Supreme Court of Appeals of Virginia, that the purpose of the exclusive remedy section is to exclude the common law remedies of an employee under Virginia law (*Griffith v. Red Raven Ash Coal Co.*, June 8, 1942, 20 S.E.2 530; *Fauver v. Bell*, June 18, 1951, 65 S.E.2 575).

Further, that court has variously stated that the Virginia law was enacted for the beneficent purpose of attaining a humanitarian end which had hitherto been frustrated by the inexorable rules of the common law (*A. Wilson and Co. v. Matthews*, March 10, 1938, 195 S.E. 490); that, because the purpose of the law was to protect the employee, it should be construed liberally in his favor (*Ellis v. Commonwealth of Virginia*, January 24, 1944, 28 S.E.2 730); and that the purpose of the law is to provide compensation to a workman for the loss of his opportunity to engage in work (*Burlington Mills Corp. v. Hagood*, February 24, 1941, 13 S.E.2 291).

In *McCann v. Newport News Shipbuilding and Dry Dock Co.*, D.C., E.D. Va., October 22, 1959, 177 F. Supp. 909, the court indicated that an award by another state would not preclude jurisdiction under the Virginia law.

More generally, a court has held that, in workmen's compensation case, the state where an injury occurred or the state where the employment contract was made can apply its own law without violation of the federal full faith and credit clause (*Romero v. Ten Eyck - Shaw, Inc.*, CA Nev. 1968, 400 F.2d 81, cert. den. 89 S.Ct. 629, 393 U.S. 1021, 21 L. Ed. 2 566).

Recognition of the stated humane purposes of the Virginia statute, the emphasis on an employee's welfare, the mandate for liberal construction in an employee's favor, and the concept that the Virginia law was designed as a substitute for common law remedies is deemed to be supportive of the determination that the exclusive provisions of the Virginia statute related to common law and other remedies under Virginia law and were not designed for extraterritorial extension to other sovereign jurisdictions. They do not preclude jurisdiction under District law.

Such a posture is consistent with the propositions that the relief available for permanent total disability under District law is unavailable under Virginia law; that the lesser amounts payable under Virginia law are less advantageous to Claimant than are the larger amounts payable under District policy as expressed in the Act; and that Claimant's execution of the Virginia agreement while hospitalized for surgery is not persuasively reflective of his exercise of an intelligent election of the Virginia remedy in preference to the District remedy.

Findings of Fact

1) On January 22, 1971:

A) Claimant was a resident of the Districtof Columbia.

B) Claimant was an employee of Employer, having entered into an employment contract in the District of Columbia during calendar 1970.

C) Employer was doing business, through employees, in the District of Columbia.

D) Claimant sustained an injury while performing duties for Emplover in Arlington, Virginia.

2) On February 5, 1971, Claimant and Employer executed an Industrial Commission of Virginia Memorandum of Agreeent as to Payment of Compensation, pursuant to which Claimant ws to receive compensation at the rate of $62 per week from and including January 30, 1971, until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia.

3) On March 15, 1971, the Industrial Commission of Virginia issued an Award – Approval of Agreement approving the memorandum of agreement and entering an award of compensation to Claimant, as follows: $62 per week, during incapacity, payable weekly, beginning January 30, 1971; medical benefits awarded for the full statutory period. The award contemplated contingencies and changes set forth in Sections 65.1-54, 65.1-55, 65.1-56, and 65.1-62 of the Virginia compensation law.

4) Payments have been and are being paid and accepted under the award.

5) On October 2, 1974, Office of Worker's Compensation Programs, U.S. Department of Labor, acknowledged receipt of Claimant's September 24, 1974, claim for compensation (for the 1971 injury) under the District of Columbia Workmen's Compensation Act.

Conclusions of Law

1) Claimant is an employee within the meaning of the District compensation act.

2) Employer is an employer within the meaning of the District compensation act.

3) Claimant sustained an injury on January 22, 1971, that falls within the jurisdiction of the Distirct compensation law.

4) A U.S. Department of Labor administrative law judge has jurisdiction to make an award under the Act to Claimant, if the merits of the claim are supportive thereof, for a disability attributable to the January 22, 1971, injury.

Decision

Under the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1), the compensation award made to Claimant under the Virginia Compensation Act is not *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia Compensation Act.

Order

That Claimant and Employer submit medical documentation to the administrative law judge within 30 calendar days after receipt of this Decision and Order.

That Claimant and Employer contact each other and the administrative law judge within 10 calendar days after receipt of this Decision and Order to establish a date for the continuation of hearings in this matter.

/s/ David W. Pelkey
David W. Pelkey
Administrative Law Judge

Dated: September 24, 1975
Washington, D.C.

United States Court of Appeals
Fourth Circuit — Docket

Misc. No. ____ General No. 781261
Related Nos. ____

☒ Pvt. Civil Admin. Review ☐ U.S. Civil Admin. Enforcement ☐ Tax Court Bankruptcy ☐ Orig. Petition Criminal

District ____ Filed in D.C. ____ Federal Prisoner ☐
Number ____ Notice of Appeal ____ State Prisoner ☐
Judge ____ Order: February 28, 1978 Type Petition Pet. for revi

Title: Washington Gas Light Company
Self-Insured Employer,
Petitioner,
vs.
Halley I. Thomas,
Respondent.

Appearance	Attorney(s) For	(Appointed On)	Address	Phone
5/5/78	Carl W. Belcher	Petitioner	1100 H Street, NW Washington, D.C. 20080	202 624-
5/8/78	James P. Green	Respondent	2101 L. Street, N.W. Suite 303 Washington, D.C. 20037	202 783-

Contents of Record Filed 6/9/78 (in vault)
Pleadings: ____ volumes.
Transcripts: ____ volumes.
Depositions: ____ volumes.
Exhibits: ____
Other: ____

Supplemental Records: Date / Contents

Withdrawal of Record

Miscellaneous	What Withdrawn	Date	By Whom	Return

Summary Of Events

Docketed: April 27, 1978
Docket Fee Paid: May 1, 1978 In Forma Pauperis ☐
Appendix: 12-6-78 10 filed (PM 12-4-WC)
Appellant's Brief: 12-6-78 25 filed. (PM 12-4-WC)
Appellant's Brief: ____
Appellee's Brief: 1/2/79 (25) filed 12/29/78 CS/rb
Appellee's Brief: ____
Rule 17 N-petitioner
Reply Brief: ____
____ Brief: ____
Additional Authority: ____
Notice of Oral Arg: ____

Date of Oral Arg: ____
Panel: (AVB) HEW KKH
Opinion Dated: 4/27/79
Judgment Dated: 4/27/79
Disposition: REVERSED UP

Reported At: ____ F2d ____
Petition For Rehearing: ____ En B
Granted ☐ Denied ☐ ____
Mandate Issued: 5/18/79
Record Returned: 5/18/79 (jhl)

A True Copy, Test:
William K. State, II, Clerk
By: [signature]
Deputy Clerk

United States Court of Appeals
Fourth Circuit — Docket

Misc. No. _____ No. 7812

DATE	FILINGS-PROCEEDINGS
4/27/78	Petition for review of order of BRB filed and cause docketed. ss
5/1/78	Notification together with copy of notification mailed certified mail to respondents. ssw
6/9/78	Certified record filed (in vault) and briefing schedule established for 7/19/78. ssw
6/20/78	MOTION to extend time for complying with certain rules of this court until after disposition of another appeal now pending, or in the alternative, the disposition of this motion, filed.
6/21/78	ORDER holding case in abeyance pending this court's decision in American Airlines, Inc. v. George Pettus, et al, No. 77-2230, filed. (ecr) Certified copies to Belcher, Green.
10/10/78	MOTION to extend time for complying with certain rules of this court including the time to file brief until after dispositic of another appeal now pending or in the alternative, the disposition of this motion, filed. ecr
10/11/78	ORDER denying motion to extend time for complying with certain rules, filed. ecr copies to Belcher, Green.
11/20/78	MOTION for summary reversal, filed. (fls)
11/20/78	MOTION of petitioner to extend time to file petitioner's brief until after disposition of petitioner's motion for summary reversal, filed. (fls) to Dukey.
11/27/78	Opposition to petitioner's motions for summary reversal and for extension of time in which to file briefs, filed. ecr to Duk
11/27/78	ORDER denying motion of petitioner for extension of time to file briefs, filed. ecr copies to Belcher, Green.
1/18/79	Certified record and proposed Per Curiam, with copies of petitioner's motion for summary reversal, respondent's opposition to motion for summary reversal, and No. 77-2230 (and with copy of Appendix for Judge Bryan), transmitted to Judges Bryan, Widener, and Hall. (CHM/lsl)
2/20/79	Certified record received from Judge Widener. (jhl)
4/27/79	Per curiam opinion granting motion for summary reversal filed. AVB UP (wu)
7/30/79	Notice evidencing the filing petition for writ of certiorari in the Supreme Court July 24, 1979 filed. (No. 79-116) (jhl)

FPI-BAB

No. 4-71-3M

THE USE OF THIS FORM IS REQUIRED UNDER THE PROVISIONS OF THE WORKMEN'S COMPENSATION ACT.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
RICHMOND

Halley I. Thomas — Employee
Washington Gas Light Company — Employer
Self-insured — Insurance Carrier

MEMORANDUM OF AGREEMENT AS TO PAYMENT OF COMPENSATION

We Halley I. Thomas (Name of Employee or Dependent) residing at 1508 Howard Road, S. E. (Number and Street)
City or Town Washington, D. C. State _____
and Washington Gas Light Company (Name of Employer)
Office address 1100 H Street, N. W. (Number and Street) Washington, D. C. (City or Town) (State)
have reached an agreement in regard to compensation for the injury sustained by said employee and submit the following statement of facts relative thereto:--

Date of injury January 22, 1971 Date disability began January 23, 1971
Nature of injury possible ruptured disc
Place of accident 5700 blk. of 11th Street, N. Arlington, Virginia
Cause of accident strain from operating air spade
Probable length of disability unknown

The terms of this agreement under the above facts are as follows:--

That the said Halley I. Thomas shall receive compensation at the rate of $ 62.00 per week based upon an average weekly wage of $ 114.67 and that said compensation shall be payable weekly

from and including the 30th day of January month 19 71 until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia

Edward R Johnson — Witness
6009-40th Ave Hyattsville, Md — Address (Number and Street)
Jacqueline D. Bullus — Witness
5102 23rd Pkwy — Address (Number and Street)

Halley I Thomas — Employee or Dependent
_____ — Employer
Self-Insured — Carrier
By H. Edward Holtz
Its H. Edward Holtz, Attorney

Approved by _____ (Commissioner or Rec'd Member)
Date of Approval _____

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Date of Agreement February 5, 1971

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. BOX 1794
RICHMOND, VIRGINIA 23214

DIVISION OF CLAIMS

Claim No. 158-930
Case of Halley I Thomas
Accident: 1-27-71

AWARD
Approval of Agreement
jf

Date March 15, 1971

To Washington Gas Light Company, (Employer)
1100 H Street NW
Washington, D C 20005

and Mr. Halley I Thomas, (Employee)
1508 Howard Road SE
Washington, D C

and self-insured, (Insurance Carrier)

Note: The compensation herein awarded is to be paid by the insurance company or by the employer, if self-insured. In the event that payment is delayed, the employee is requested to write the insurance company or his employer, before taking it up with the Commission.

Take notice that the Industrial Commission of Virginia has approved the memorandum of agreement entered into February 5, 1971 for the payment of compensation under the Workmen's Compensation Act, and in accordance with the provisions of said Act enters an award of compensation as follows:

$62.00 per week, during incapacity, payable weekly, beginning January 30, 1971.

Medical benefits are awarded for the full statutory period.

P. H. HARRINGTON

APR 2 1971

I.S.B. APR 1 1971

INDUSTRIAL COMMISSION OF VIRGINIA

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U.S. DEPARTMENT OF LABOR

Employment Standards Administration
Office of Workers' Compensation Programs
Washington, D.C. 20211

Date: July 11, 1975

Reply to Attn. of: ECLD

Subject: File No. 89630—Halley I. Thomas vs. Washington Gas Light Company—D/I: 1/20/71

To: H. Stephen Gordon
Chief Judge, Office of
Administrative Law Judges

The attached case is referred to your office for formal hearing pursuant to section 19(d) of the Longshore and Harbor Workers' Compensation Act and section 702.317 of the Regulations.

The claimant is represented by Joseph H. Koonz, Esquire, 925 - 15th Street N.W., Washington, D.C. 20005, who requested the hearing in behalf of the claimant.

The self-insured employer, Washington Gas Light Company, is represented by Paul H. Harrington, Esquire, 1100 "H" Street, N.W., Washington, D.C. 20005.

A claim was made for temporary total disability from January 20, 1971 to date and continuing, as a result of a back injury sustained by the claimant.

An informal conference was held at this office on April 8, 1975, at which time the issues were discussed and the facts pertinent to the claim were considered.

Supreme Court of the United States

No. 79-116

Halley I. Thomas,

Petitioner,

v.

Washington Gas Light Company,
et al.

ORDER ALLOWING CERTIORARI. **Filed** November 26 **, 19** 79

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth ----------**Circuit is granted.**

FILED
SEP 14 1979
MICHAEL RODAK, JR. CLERK

No. 79-116

In the Supreme Court of the United States

OCTOBER TERM, 1978

HALLEY I. THOMAS, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

JOSHUA T. GILLELAN II
Attorney
Department of Labor
Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-116

HALLEY I. THOMAS, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The final opinion of the Department of Labor Benefits Review Board (Pet. App. 3a-8a) is reported at 9 BRBS 760. The Board's earlier opinion (Pet. App. 16a-19a) is unreported. The administrative law judge's original opinions (Pet. App. 34a-50a, 20a-32a) and his opinion on remand (Pet. App. 9a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1979. The petition for a writ of certiorari was filed on July 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Full Faith and Credit Clause bars an award of workers' compensation in one jurisdiction following an award in another jurisdiction whose statute provides, only in general terms, that the benefits it confers are exclusive.

STATEMENT

Petitioner, a resident of the District of Columbia, was hired by respondent Washington Gas Light Company in the District of Columbia as a heavy laborer. Although petitioner occasionally worked in the Virginia and Maryland surburbs of the District of Columbia, approximately 60% of his duties were performed in the District (Pet. App. 36a-37a).

On January 22, 1971, petitioner sustained a disabling injury to his back while breaking concrete with an air hammer in Arlington, Virginia. He has been totally disabled ever since that time (Pet. App. 31a, 37a).[1]

Two weeks after the injury, petitioner executed a "Memorandum of Agreement as to Payment of Compensation" under which respondent agreed to pay him compensation of $62 per week for temporary total disability pursuant to Virginia law. The Industrial Commission of Virginia subsequently approved the agreement on March 15, 1971. Petitioner received these benefits until they reached the maximum amount payable under Virginia law (Pet. App. 45a, 49a). Petitioner is entitled to no further benefits—periodic compensation for continuing disability or medical treatment—under Virginia law.

[1]Less than a year after the injury, petitioner attempted to perform clerical work in one of respondent's offices. He was unable to do the necessary stooping and bending, however, and was forced to give up the job (Pet. App. 38a).

On September 24, 1974, petitioner notified the Deputy Commissioner of the Department of Labor's Office of Workers' Compensation Programs of his intention to apply for compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501-502. Petitioner's claim was determined by an administrative law judge, who rejected respondent's contention that the Full Faith and Credit Clause made the prior Virginia award *res judicata* and thus barred an additional claim under the District of Columbia Act (Pet. App. 44a). Accordingly, the administrative law judge awarded petitioner benefits for permanent total disability from the date of his injury (*id.* at 31a). The Benefits Review Board remanded the case for the receipt of additional evidence (*id.* at 18a). After further hearings, the administrative law judge issued a Supplemental Decision and Order reiterating his conclusion that the Full Faith and Credit Clause does not preclude a subsequent award under federal law and again granting petitioner permanent total disability benefits (*id.* at 13a). The Benefits Review Board unanimously affirmed that decision (*id.* at 8a).

The court of appeals reversed, placing sole reliance on its prior decision in *Pettus* v. *American Airlines, Inc.*, 587 F. 2d 627 (4th Cir. 1978), petition for cert. pending, No. 78-1739 (Pet. App. 2a).

DISCUSSION

The question presented in this case is whether the Full Faith and Credit Clause bars a workers' compensation award when the injured employee has received a prior award in a jurisdiction whose workers' compensation statute provides, in general terms, that the remedies that it

creates are exclusive. See Va. Code § 65.1-40 (1975). That question is identical to the central question presented in *Pettus* v. *American Airlines, Inc.*, No. 78-1739. The Director of the Office of Workers' Compensation Programs believes that the court of appeals erred in *Pettus* and has urged the Court to grant certiorari in that case. Should the Court decide to grant review in *Pettus*, its disposition would govern the outcome in the present case. We therefore suggest that the petition in this case be held pending the Court's disposition in *Pettus*.[2]

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Pettus* v. *American Airlines, Inc.*, petition for cert. pending, No. 78-1739.

Respectfully submitted.

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SEPTEMBER 1979

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[2]The private respondents in *Pettus* have contended that the petition in that case was not timely filed. We disagree with that contention for the reasons stated in our *Pettus* brief (pages 6-7). If the Court were to conclude, however, that the *Pettus* petition was filed out of time, it should grant the petition in the present case to resolve the important question presented.

DOJ-1979-09

Supreme Court, U.S.
FILED
NOV 1 1979
MICHAEL RODAK, JR., CLERK

No. 79-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-116

HALLEY I. THOMAS, *Petitioner,*

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent.*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTION PRESENTED

In a case where the law of the forum of an employee's residency and of the employment contract foreclosed workmen's compensation benefits if an award were available under the law of the state wherein the claim arose, the following question is presented:

> Under the full faith and credit clause of the Constitution of the United States, does not an award of compensation under the Virginia Workmen's Compensation law bar a further recovery for the same injury under the District of Columbia Workmen's Compensation law?

COUNTERSTATEMENT OF THE CASE

Petitioner Halley I. Thomas was employed by Respondent Washington Gas Light Company (WGL) in 1970 (App. 60)* As a result of an incident occurring on January 22, 1971, in Arlington, Virginia, and outside the District of Columbia (App. 108-109), Mr. Thomas began receiving social security benefits (App. 76). He also received workmen's compensation pursuant to an "Industrial Commission of Virginia Memorandum of Agreement as to Payment of Compensation" (App. 108). Near the bottom of that document appear these words (App. 108):

> "The terms of this agreement under the above facts are as follows:—
>
> That the said Halley I. Thomas shall receive compensation at the rate of $—— and that said compensation shall be payable . . . until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia ——"

As required by the Industrial Commission, the signatures of Petitioner, WGL's representative and two witnesses appear immediately thereafter. The Industrial Commission of Virginia approved the Agreement and entered an Award (App. 109).[1] No effort was made

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* References are to the appendix to the briefs filed in the U.S. Court of Appeals for the Fourth Circuit (Record No. 78-1261). A copy of that appendix is lodged with the Clerk for the convenience of the Court.

[1] The manner by which Petitioner secured his award in Virginia does not "set apart" his case from other cases. To the contrary, this case is representative of approximately 95% of all claims for workmen's compensation in the various states. *Dillard* v. *Virginia Industrial Commission*, 416 U.S. 783 at 785 n. 2 (1974).

In this context, it is fair to conclude that Petitioner overstates his case by implying that it arises out of jurisprudential confusion and involves difficult and nagging constitutional questions (Petition at 5, 15, 17). None exists.

by Mr. Thomas to have the Agreement or his Award amended, rescinded, altered or voided.[2] Rather, a claim was filed more than three years later for benefits under the laws of the District of Columbia (App. 106, 115). WGL opposed the grant of such additional benefits and administrative proceedings ensued (App. 48-105).[3]

Mr. Thomas and his wife, a "segregation specialist" for a casualty insurance company, were witnesses. Neither made any claim of failure to understand the Agreement or the Award. Under questioning by counsel of his choice, Mr. Thomas acknowledged receipt of payments and the Agreement and Award were received into evidence (App. 96).

The Administrative Law Judge awarded compensation. The Benefits Review Board of the United States Department of Labor affirmed, stating (App. 7):[4]

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[2] Note that the attorney for Mr. Thomas claimed to have represented him since July 1973 (App. 29).

[3] Prior to issuance of the Award, Petitioner had a right to an adjudicatory hearing before the Industrial Commission (Va. Code § 65.1-94 et seq.). Such right survives the Award.

An award may be set aside upon a showing of unauthorized acts of legal counsel, "fraud, imposition and mistake." No chronological barriers for relief are imposed. *Harris* v. *Diamond Const. Co.*, 184 Va. 711, 36 S.E. 2d 573 at 577 (1946). No application for this relief was made by Mr. Thomas and it does not become him to now remark that his Award had been merely "rubber stamped" by the Industrial Commission and to contend that his Award is somehow less than final (Petition at 8).

[4] The District of Columbia statute makes the Longshoremen's and Harbor Workers' Compensation Act applicable in the District of Columbia. Both statutes are administered by the U.S. Depart-

> "In Pettus v. American Airlines, Inc., 6 BRBS 461, BRB No. 77-115 (Aug. 22, 1977), we specifically held that the Virginia statute contains no explicit prohibition which would preclude recovery (sic) injuries under the District of Columbia Act."

The *Pettus* case not only preceded the instant case at the administrative level, but also on judicial review. On September 26, 1978, the U.S. Court of Appeals for the Fourth Circuit, which later also decided the instant case, vacated the award of compensation in *Pettus,* stating (587 F.2d 627 at 629-630 (4th Cir. (1978), *cert. denied,* —— U.S. —— (No. 78-1739, October 1, 1979)):

> "[C]laimant urges that he still had the right to proceed under the District of Columbia law for compensation benefits, with only the obligation to credit thereon any award he procurred in Virginia. Precedent of last resort refutes this contention."

Then, the court said (at 631):

> "Turning to the Virginia statute, we find it as exclusive of a second proceeding as the Chief Justice

---

ment of Labor (20 CFR 701.102). Accordingly, the District of Columbia statute is administered by District No. 40 of the Office of Workmen's Compensation Programs, U.S. Department of Labor (20 CFR 704.201).

In 1971, recovery under the Longshoremen's and Harbor Workers Compensation Act (33 U.S.C. § 901 et seq.) and, therefore, under the District of Columbia Workmen's Compensation Act (D.C. Code § 36-501 et seq.) was *expressly* prohibited by Section 903(a) in any case where a remedy was available under state law. A statute of this type "delimits local coverage generally and leaves nothing to the claimant's election . . . . This . . . is not an election . . . between coexisting rights, but a definition in advance of the basic scope of the local statute." Larson, Workmen's Compensation, *Duke Law Journal,* Vol. 1971, p. 1050 n. 46.

> in *Magnolia* found the Texas law. Under the statute, he noted an award "is explicitly made by statute in lieu of any other recovery for injury to the employee.' 320 US at 435. . . .

And the court noted that (at 631-32):

> "In verification of our construction of this section, the Virginia Law Review observes: 'Under the Workmen's Compensation Act, any collateral action the employee might have against his employer is barred unless the employee expressly waives coverage of the Act's provisions.' A footnote thereto adds: 'Employees may waive coverage of the Act . . . but if they do not, their right to compensation excludes any other claims they may have against the employer. . . .' " (Footnote omitted.)

In the instant case, the same court below noted that Mr. Thomas "had sought and obtained" his award from the Industrial Commission of Virginia and found that his case involved "an identical factual premise and corresponding question of law. . ." with *Pettus* v. *American Airlines* (Petitioner's Appendix A at 2a).

The award of compensation was vacated in *Pettus* and, upon petition to this Court, the following question was presented (No. 78-1739; Petition at 2):

> "Whether a final decision of the Industrial Commission of the state of Virginia bars a subsequent claim for worker's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as it is made applicable to the District of Columbia, under the reasoning of this Court in Industrial Commission v. McCartin, 330 U.S. 622 (1947)."

In the instant case, the question presented by Petitioner is framed (Petition at 2):

> "Whether the constitutional obligation to give full faith and credit to the Virginia Workmen's Compensation Act, including its exclusive remedy provision, Va. Code § 65.1-40 (1975 Repl. Vol.), precluded an award of compensation benefits by the District of Columbia following approval by the Industrial Commission of Virginia of a voluntary workmen's compensation agreement."

Note that the issues are the same.[5] Certiorari was denied the *Pettus* case on October 1, 1979.

REASONS FOR DENYING THE PETITION

Having obtained an Award under the Virginia Workmen's Compensation Act, Petitioner is barred by the express words of the Virginia Act and precluded by the doctrines of res judicata and collateral estoppel from obtaining a subsequent award in Virginia. Petitioner is likewise precluded from obtaining a subsequent award in the District of Columbia, not only for the same reasons but because the express terms of the applicable District of Columbia Workmen's Compensation Act also foreclose recovery.

The Fourth Circuit has correctly interpreted and applied the Virginia statutes and has correctly applied the principles of full faith and credit articulated by this Court in *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430 (1943), and *Industrial Commission of Wisconsin* v. *McCartin,* 330 U.S. 622 (1947). See also *Pettus* v. *American Airlines, Inc.,* 587 F.2d 627 (4th Cir. 1978), *cert. denied,* —— U.S. —— (No. 78-1739, October 1, 1979).

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[5] Halley I. Thomas and George Pettus have the same counsel.

ARGUMENT

I

The Petition Is Without Justification Because The Fourth Circuit Faithfully Adhered To The Directives Established By This Court In The Magnolia and McCartin Cases

Petitioner describes the ruling of this Court in *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430 (1943), as follows (Petition at 6):

> "[T]his Court concluded that the Texas exclusive remedy provision foreclosed any claim under the Louisiana statute."

In *Magnolia,* the Court stated (320 U.S. at 432):

> "The question for decision is whether, under the full faith and credit clause, Art. IV, § 1 of the Constitution of the United States, an award of compensation for personal injury under the Texas Workmen's Compensation Law . . . bars a further recovery of compensation for the same injury under the Louisiana Workmen's Compensation Law . . . ."

The facts in *Magnolia* were that an employee was injured while working in Texas and received workmen's compensation benefits in Texas. He then brought a proceeding in the Louisiana District Court to recover compensation under Louisiana law. On review, this Court held that constitutional protections based on full faith and credit extend to awards of workmen's compensation (320 U.S. at 438). The Court concluded (id. at 442):

> "The remedies afforded to respondent by the Texas and Louisiana Workmen's Compensation Laws are likewise rendered mutually exclusive by the Texas judgment and the full faith and credit

clause. The Texas award, being a *bar to any further recovery* of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act" (emphasis added).

* * * * *

"[P]etitioner . . . is [not] required to provide further payments to respondent, contrary to the terms of the Texas *award,* which, if the full faith and credit clause is to be given any effect, *was a conclusive determination between the parties* that petitioner should be liable for no more than the amount of the Texas award" (emphasis added).

The reasons were stated (id. at 439):

"These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be *as conclusive* of the rights of the parties in every other court *as in* that *where the judgment was rendered,* so that a cause of action merged in a judgment in one state is likewise merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force" (emphasis added).

The Fourth Circuit adhered to *Magnolia.* In granting WGL's motion for summary reversal, the court stated (Petitioner's App. A at 2a):

"Upon an identical factual premise and corresponding questions of law, we set aside a similar order of the BRB in Pettus v. American Airlines, Inc., 587 F.2d 627 (4th Cir. 1978). Consequently, we perceive no reason to hear argument on the appeal."

In *Pettus,* the Fourth Circuit compared the Texas and Virginia workmen's compensation statutes and held (587 F.2d at 631):

"Turning to the Virginia statute, we find it as exclusive of a second proceeding as the Chief Justice in *Magnolia* found the Texas law."

The exclusive nature of both statutes was then detailed. Under the Texas statute, an award "is explicitly made by statute in lieu of any other recovery for injury to the employee." Comparing this to the Virginia statute, the Fourth Circuit found (id. at 631):

"How precisely the Virginia law fits into the Texas mold appears at once upon reading Virginia's Workmen's Compensation law:

"§ 65.1-40. Employee's rights under the Act exclude all others. The rights and remedies herein granted to an employee . . . shall exclude all other rights and remedies of such employee, . . . *at common law or otherwise,* . . . (Va. Code Ann. § 65.1-40 (Rep. Vol. 1973). (Accent added.)"

As in the *Pettus* case, Petitioner is attempting to toss up his contentions so as to require this Court to choose between *Magnolia* and *Industrial Commission* v. *McCartin,* 330 U.S. 622 (1947). There, the employee and the employer were residents of Illinois and the contract of employment was made in Illinois. The employee commuted daily to and from his place of work in Wisconsin. Being injured in Wisconsin, he filed in that state and about six weeks later also filed in Illinois. Some four months later a settlement contract was made between the employer and the employee which stated that: "This settlement does not affect any rights that

applicant may have under the Workmen's Compensation Act of the State of Wisconsin" (at 629). On review, this Court noted that in *Magnolia* the award—

> "was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state. . . . And since the Texas award had the degree of finality contemplated by the full faith and credit clause, it was held that Louisiana was constitutionally forbidden from entering a subsequent award under its statute" (330 U.S. at 626-27).

The Court concluded that these circumstances did not exist in *McCartin,* the Illinois award being different in its nature and effect from the Texas award in *Magnolia* (id. at 627). Of "decisive significance" was the "fact" that an administrator of the Illinois workmen's compensation statute had permitted the settlement contract to become "part of the Illinois award" (id. at 630). Hence, the Illinois administrator's ruling permitted a second award in Wisconsin. In these circumstances, *Magnolia* was deemed not to control (id. at 630).

The Fourth Circuit has construed the Virginia statute. In so doing, it has followed the principles set forth by this Court in *Magnolia* and *McCartin.* As in *Magnolia,* a second recovery is foreclosed.

II

There Is No Conflict Among States or Circuits Regarding The Application Of The Virginia Workmen's Compensation Act

Petitioner's claim is based solely on an interpretation of Virginia law. No case is cited showing a conflict on the proper interpretation of that law, and indeed, no such conflict exists. Conflicts which may exist with respect to application of the workmen's compensation

statutes of other states need not be here resolved. Hence, there is no conflict among states or federal circuits in this case.

As discussed in Argument I, the Fourth Circuit has correctly found the Virginia Workmen's Compensation Act to provide Petitioner with an exclusive remedy. There is no other judicial decision in the state or federal courts which conflicts with that finding and only two other court decisions involving the Virginia Workmen's Compensation Act need be here considered: *Pettus* v. *American Airlines,* 587 F.2d 627 (4th Cir. 1978), *cert. denied,* —— U.S. —— (No. 78-1739, October 1, 1979); and *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP,* 583 F.2d 1273 (4th Cir. 1978), *cert. denied,* —— U.S. —— (No. 78-1012, February 26, 1979).

In *Newport News* (decided September 21, 1978), the Fourth Circuit found that denial of a workmen's compensation claim by the Virginia Commission did not bar receipt of an award under the federal Longshoremen's and Harbor Workers' Compensation Act. The employer there argued that denial of the claim under state law excluded an award under the federal statute. This contention was rejected on a finding of no "constitutional objection to the pursuit of both state and federal remedies" (583 F.2d at 1277).

In *Pettus* (decided September 26, 1978), the Virginia Act was interpreted to bar a subsequent award under the District of Columbia Act. The District of Columbia has adopted the Longshoremen's and Harbor Worker's Compensation Act as the local workmen's compensation statute. This did not create the same federal-state issue that existed in *Newport News* because Mr. Pettus was pursuing a subsequent remedy

under local law (in the District of Columbia), not a separate federal remedy.

The Fourth Circuit decision in *Pettus* is the most recent and strongest authority interpreting the exclusive nature of the Virginia Workmen's Compensation Act. There is no existing conflict as to the correctness of the *Pettus* decision and there is no need for this Court to speculate on possible conflicts involving the laws of other states.

III

Petitioner Is Not Entitled To Recover Benefits Under The Terms Of The Applicable District of Columbia Workmen's Compensation Act

The District of Columbia has adopted (D.C. Code Ann. § 36-501 (1973 & Supp. IV 1977)) the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.* (1970 & 1978)) as the workmen's compensation law in the District of Columbia. Section 903(c), as it applied in 1971 and to the facts of the instant case, barred relief because workmen's compensation benefits had been received under a Virginia award. Under Section 903, compensation was not payable if recovery for the disability is available under another state law:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but *only* if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability* or death through workmen's compensation proceedings *may not validly be provided by State law*" (emphasis added).

On October 27, 1972, Section 903(a) was amended to omit the exclusion relating to remedies available under

state law, effective November 27, 1972. At the time of Petitioner's injury on January 22, 1971, however, the exclusion under Section 903(a) was in force and effect.

The Virginia award conclusively established that a remedy was available under state law and that the claim was no longer recognizable under either LHWCA or under the District of Columbia Code. Although the ruling of the court below is premised only upon the statutes of Virginia, those of the District of Columbia were noted by WGL in argument and cannot be ignored by Petitioner in this Court. Thus, Petitioner's sole remedy in January 1971 was in Virginia, WGL was under no obligation to file anything in the District of Columbia, the one-year statute of limitations was not tolled and his 1974 "supplemental" claim must fail (33 U.S.C. §§ 912(d), 913(a), 930(f)).

CONCLUSION

Wherefore, the Petition for a Writ of Certiorari should be denied.

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October 31, 1979

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF PETITIONER

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65 VA. CODE § 58 (1950) (amended 1968) 4

65 VA. CODE § 37 (1950) (amended 1968) 4

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Restatement of Conflicts of Laws § 403 (1934) 12

Restatement (Second) of Conflict of Laws § 182 (1971) ... 12

4 A. Larson, *The Law of Workmen's Compensation*

§ 85.30 (1970) 15

§ 85.40 (1970) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.79-116

HALLEY I. THOMAS, *Petitioner,*

v.

WASHINGTON GAS LIGHT COMPANY

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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The claimant, Halley I. Thomas, petitions this Honorable Court for reversal of the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Fourth Circuit in this case (app., 1a), is unreported. The decision upon which the Fourth Circuit summarily reversed is *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), *cert. denied*, _____ U. S. _____, No. 78-1739 (1979). The final decision of the Benefits Review

Board (app., 3a), is reported at 9 BRBS 760 (1978). The initial decision of the Benefits Review Board (app., 16a), and the interlocutory (app., 34a), final (app., 20a), and supplemental (app., 9a) decisions of the Administrative Law Judge are all unpublished.

JURISDICTION

The petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

On September 24, 1974, Mr. Thomas notified the Deputy Commissioner of the Office of Workers' Compensation Programs (OWCP) of his intention to seek compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901-952 (1970) as adopted by the District of Columbia to serve as the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501-502 (1973 Ed.). Mr. Thomas' claim was initially referred to Administrative Law Judge David Pelkey. Judge Pelkey ruled that the U.S. Constitution's full faith and credit clause did not make the Virginia benefits *res judicata* (app., 34a). Subsequently, in a Final Decision and Order dated March 4, 1976, Judge Pelkey awarded Mr. Thomas benefits for permanent total disability beginning as of the date of injury (app., 20a). Washington Gas Light's (WGL) appeal to the Benefits Review Board, U.S. Department of Labor, resulted in a remand for the purpose of receiving more evidence (app., 16a). After an additional hearing, Judge Pelkey issued a Supplemental Decision and Order on January 21, 1977, reiterating his view that the full faith and credit clause did not preclude

the subsequent award and upholding the permanent total disability benefits (app., 9a). WGL again appealed to the Board, which unanimously affirmed the Administrative Law Judge (app., 3a).

WGL sought review before the United States Court of Appeals for the Fourth Circuit. On April 27, 1979, in an unpublished *per curiam* opinion, the Fourth Circuit reversed without argument on the strength of *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978) *cert. denied.* _____U.S. _____, No. 78-1739 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, Section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.

Title 28 of the United States Code, § 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The Virginia Workmen's Compensation Act is embodied in Title 65.1 of the Virginia Code. VA. Code, §65.1-40 (1979 Repl. Vol.), states:

> §65.1-40. Employee's rights under Act exclude all others. —The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employees, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (Code 1950, §65-37, 1968, c.660)

Va. Code, §65.1-61 (1975 Repl. Vol.) declares:

> §65.1-61. Foreign injuries. —When an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if:
>
> (1) The contract of employment was made in this State;
> (2) The employer's place of business is in this State; and
> (3) The residence of the employee is in this State;
>
> Provided the contract of employment was not expressly for service exclusively outside of the State.
>
> But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act. (Code 1950, 65-58, 1968, c.660)

QUESTION PRESENTED

Whether, by operation of the full faith and credit clause, approval by the Industrial Commission of Virginia of an agreement providing temporary disability benefits under the Virginia Workmen's Compensation Act precludes an award for permanent disability under the compensation law of the District of Columbia.

STATEMENT OF THE CASE

Halley I. Thomas, a resident of the District of Columbia since 1949, was hired in 1970 as a heavy laborer by the Washington Gas Light Company (WGL) at their employment office in Washington, D.C. WGL's home office is also located in the District of Columbia. Although Mr. Thomas occasionally worked in the neighboring jurisdictions of Virginia and Maryland, approximately 60% of his duties were performed in the District. For his endeavors, Mr. Thomas received a paycheck drawn upon a District of Columbia bank.

On January 22, 1971, Mr. Thomas was breaking concrete with an air hammer in Arlington, Virginia when he sustained a disabling injury to his back. Since that date, Mr. Thomas has been unable to return to his occupation.

Prior to his being represented by counsel, Mr. Thomas agreed to accept temporary total disability benefits under the Virginia Workmen's Compensation Act on February 5, 1971, fourteen days after his injury. The Industrial Commission of Virginia subsequently approved the agreement on March 15, 1971. Mr. Thomas received the Virginia benefits until they reached the maximum amount payable under Virginia law. Mr. Thomas is currently without any disability compensation and medical coverage.

SUMMARY OF ARGUMENT

The extrajurisdictional effect of an award of the type here involved is controlled by this Court's unanimous decision in *Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622 (1947). There this Court upheld a subsequent award under circumstances virtually identical to those in the present controversy. The decision established that, in the absence of an unmistakeable statutory announcement otherwise, a compensation settlement agreement shall not be construed as a final and conclusive determination of all the parties' rights and obligations. At most, the award may be final and conclusive only as to rights under the laws of that jurisdiction. Therefore, no full faith and credit barrier arises to a subsequent award under the laws of another state.

The Virginia exclusive remedy provision, Va. Code §65.1-40 (1975 Repl. Vol.), does not constitute a bar to extrajurisdictional remedies for several reasons. Initially, the Virginia judiciary has confined the operation of the provision to the accomplishment of its singular purpose, the substitution of a right to compensation for the previous right to sue for damages at common law. Virginia has specifically declined to expand the scope of the provision to preclude rights other than the right to sue an employer. Secondly, the exclusive remedy provision is to be construed liberally in the employee's favor and with a view to the humanitarian purpose of the Act. Yet the construction of the

Fourth Circuit operates most harshly against the claimant and at cross purposes to the Act's underlying goals. Thirdly, the Virginia statute is indistinguishable from the Illinois Act considered in *McCartin*. Hence, the Virginia Statute fails to express in "unmistakeable language" an intent to preclude remedies under the laws of another state as required by the *McCartin* mandate. Finally, Virginia explicitly embraces by statute a successive award where the situation is reversed and the claimant has first sought benefits elsewhere. By the same reasoning used in *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), this circumstance compels the conclusion that the intent of the Virginia statute is to permit the District of Columbia award.

In the absence of an express statutory declaration of exclusivity, the Virginia award lacks in its inherent nature the incidents of finality necessary to effect a discharge of all the claimant's rights wheresoever they might arise. Unlike a transitory tort action, the right to workmen's compensation is not a single, indivisible cause of action for which a choice of forum must be made between two or more jurisdictions authorized to grant a remedy. A compensation award received in one jurisdiction cannot possibly purport to have litigated the entirety of the claimant's rights. The limited effect of a compensation award is implicit in the *McCartin* decision, in the Virginia statute and others like it which explicitly reserve the right to authorize successive awards.

Whatever the *res judicata* effect attaching to a fully adjudicated compensation claim, the elements of a final and irrevocable choice of law are particularly absent in the facts of the present case. The ministerial approval by the Industrial Commission of Virginia of the agreement (app., 53a) does not rise to the level of a deliberate, considered adjudication. Nor can the claimant's acceptance of temporary disability benefits voluntarily offered by his em-

ployer in any sense be said to constitute an informed and irrevocable choice of law and forum.

Finally, the Virginia agreement may only be accorded the *res judicata* effect in the District of Columbia that it has in Virginia. Since the agreement was restricted to temporary disability, the Virginia Commission retained jurisdiction to issue a supplemental award for any residual permanent disability. With the question of permanent disability undecided, the Virginia award was not completely final and the D.C. award for permanency represents no collateral attack on the Virginia agreement.

ARGUMENT

I. The Full Faith And Credit Clause Does Not Operate To Make Approval By The Industrial Commission Of Virginia Of A Workmen's Compensation Agreement A Bar To An Award For Permanent Disability Under The Compensation Law Of The District Of Columbia.

The present controversy is squarely governed by this Court's mandate in *Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622 (1947). There, both the employee and his employer were residents of Illinois, where the contract of employment was formed. However, on a building job in Wisconsin, the employee suffered an injury to his eye. By virtue of a settlement contract approved by a workmen's compensation commissioner, the employer began paying benefits under the Illinois compensation law. The agreement was "in full and final settlement of any and all claims arising out of [the employee's] injury by virtue of the Illinois Workmen's Compensation Act." 330 U.S. at 624. Under the terms of that Act, the recovery of benefits was to the exclusion of any other "common law or statutory right." Nonetheless, the Wisconsin Workmen's Compensation Commission subsequently granted a compensation award to the claimant according to the terms of the Wisconsin Act.

This Court unanimously upheld the Wisconsin award. The underlying basis of the Court's rationale is disclosed by its concluding statement: "Since this Illinois award is final and conclusive only as to rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws." 330 U.S. at 630. Although the settlement contract had included a proviso disavowing any impact on the claimant's Wisconsin rights, Justice Murphy noted that "the reservation spells out what we believe to be implicit in that Act—namely that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state." 330 U.S. at 630.

The decision in *Magnolia Petroleum Co.* v.*Hunt*, 320 U.S. 430 (1943), thought to be controlling by the Fourth Circuit, is wholly distinguishable from the present controversy. In *Magnolia*, an oil field worker was injured in Texas and filed a claim for compensation in that state. The employer's insurer began paying the employee weekly benefits without an award. Eventually, a dispute arose and a hearing was set on the claim. Upon the employee's failure to appear, a single lump sum award was entered on behalf of the claimant as "full compensation for his injury." 320 U.S. at 433. No appeal was taken and the award became final. Subsequently, the employee filed a claim with Louisiana, where he resided, and received an award under that Act.

The majority found that the Texas compensation award was "explicitly made by statute in lieu of any other recovery for injury to the employee. . . ." 320 U.S. at 435. The majority also concluded that the Texas award

"was a conclusive determination between the parties that petitioner should be liable for no more than the amount of the Texas award." 320 U.S. at 442. Thus, in a 5-4 decision, this Court held that Louisiana was obliged by the full faith and credit clause to view the Texas award as a bar to enforcement of its own statute.

The unanimous *McCartin* decision enumerated the basic distinction underlying the two cases when it ruled:

> If it were apparent that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury, the decision in the *Magnolia Petroleum Co.* case would be controlling here. The Court there found that the compensation award under the Texas Workmen's Compensation Law was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state. And since the Texas award had the degree of finality contemplated by the full faith and credit clause, it was held that Louisiana was constitutionally forbidden from entering a subsequent award under its statute. But we do not believe that the same situation exists in this case, the Illinois award being different in its nature and effect from the Texas award in the *Magnolia* case. 330 U.S. at 626-27 (citations omitted).

Hence, the ultimate measure of the controversy must be the nature and effect accorded the Virginia agreement. This Court has isolated as relevant to such a dispute considerations of clarity, scope and intent of the statutory language and the degree of finality of the compensation award. As an overall principle, it is clear that unless the Virginia agreement was intended to be final and conclusive of the entirety of Mr. Thomas' rights wheresoever they might arise, there is no full faith and credit restriction imposed on the District of Columbia.

A. The Virginia Workmen's Compensation Act's Exclusive Remedy Provision Did Not Impute To The Compensation Agreement The Effect Of Foreclosing The Claimant's Right To Any Further Remedy Under The Laws Of The District Of Columbia.

It is clear from Virginia decisional law, universal principles of workmen's compensation, and long-standing directives by this Court, that the Virginia exclusive remedy provision is not effective to inhibit a claimant's remedies outside the state of Virginia. At most, the Virginia Act makes its benefits the exclusive remedy *within that jurisdiction*. The Virginia provision states:

> The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by 'accident' shall exclude all other rights and remedies of such employee . . .at common law or otherwise on account of such injury, loss of service or death.

Va. Code, §65.1-40 (1975 Repl. Vol.).

The Court of Appeal's expansive reading of this provision is directly contrary to the Virginia Supreme Court's own interpretation. Virginia has declared that the sole purpose of the provision is to substitute an administrative compensation remedy for the previously unsatisfactory common law action. The scope of the provision has thus been limited by the Supreme Court of Virginia in a manner consistent with that purpose. It has been repeatedly held that only the employee's right to sue his employer for damages is barred by the acceptance of compensation under the Act. *Veale* v. *Norfolk and W. Ry.*, 204 Va. 822, 139 S.E.2d 797 (1965), *Fauver* v. *Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). The Fourth Circuit itself has permitted

a recipient of Virginia compensation benefits to seek recovery for the same injury under the Longshoremen's & Harbor Workers' Compensation Act and, in negligence, under the general maritime law or as a seaman under the Jones Act, 46 U.S.C. §688 (1970). *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). However, nine years later, the Fourth Circuit departed from *Biggs* and Virginia precedent, holding that the Virginia statute precludes further compensation recovery under the District of Columbia. *Pettus* v. *American Airlines*, 587 F.2d 627 at 631-32 (4th Cir. 1978), *cert. denied*, _____ U.S. _____, No. 78-1739 (1979).[1] Nonetheless, it would be improvident to ascribe any precedental value to *Pettus*, because it was soon rejected by the District of Columbia Circuit in *Director, OWCP* v. *National Van Lines, Inc.*, No. 78-1259 (D.C. Cir. 1979) (slip op.). In the latter case, it was argued that the employee was barred from pursuing his remedies under the District of Columbia Workmen's Compensation Act solely because he had accepted an earlier award of workmen's compensation benefits under the Virginia Act. The District of Columbia Circuit explained that unlike many controversies over choice of law, it was not neccessary to identify one jurisdiction with predominant contracts or interests to the exclusion of

[1] In addition, the Fourth Circuit's construction of *Magnolia* and *McCartin* is in express conflict with the position of most state courts. *Jordan* v. *Industrial Commission*, 117 Ariz. 215, 571 P.2d 712 (1977); *Stanley* v. *Hinchcliffe and Kenner*, 395 Mich. 645, 238 N.W.2d 13 (1976); *Ryder* v. *Insurance Company of North America*, 282 S.2d 771 (La. App. 1973); *Wood* v. *Aetna Casualty & Surety Company*, 260 Md.651, 273 A.2d 125 (1971); *Industrial Track Builders of America* v. *Lemaster*, 429 S.W.2d 403 (Ky. 1968); *Harrison Company* v. *Norton*, 244 Miss. 752, 146 S.2d 327 (1962); *Cook* v. *Minneapolis Bridge Construction Co.*, 231 Minn. 433. 43 N.W.2d 792 (1950). *See also Restatement of Conflict of Laws* § 403 (1934); *Restatement (Second) of Conflict of Laws*, §182 (1971).

another, so long as the proposed forum's interest was legitimate and substantial in itself. In repudiating the conclusion reached by the Fourth Circuit in *Pettus*, the Court adopted the reasoning of another panel of the Fourth Circuit, reached five days before in *Newport News Shipbuilding and Dry Dock Co.* v. *Director, Office of Workers' Compensation Programs*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979), and concluded that the Virginia Act precluded the employee from pursuing only his other Virginia common law and statutory remedies. The court also found that in claims where the District of Columbia had concurrent jurisdiction, the principles of *res judicata* and collateral estoppel did not preclude the District of Columbia Workmen's Compensation Board from awarding additional benefits based on its own independent decision, pursuant to the District of Columbia Act.

The District of Columbia Circuit's interpretation of the exclusive remedy provision is virtually required by the universal principle recognized in Virginia that the workmen's compensation act should be liberally construed in favor of the employee in order to effectuate its humanitarian purpose. *Barker* v. *Appalachian Power Co.*, 209 Va. 162, 163 S.E.2d 311 (1968); *Byrd* v. *Stonega Coke & Coal Co.*, 182 Va. 212, 28 S.E.2d 725 (1944). The humanitarian purpose of the Virginia statute was to guarantee prompt aid for the injured employee often denied by the inexorable rule of the common law. *Fauver* v. *Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). Thus, the Virginia courts have resolved to construe the exclusive remedy provision in light of the controlling purposes of the Act. *Griffith* v. *Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942).

Unfortunately, the lower Court's decision abandons the rule of liberal construction and operates most harshly against the injured employee. The decision below fore-

closes the claimant's rights under the District of Columbia Workers' Compensation Act. The benefits payable under that Act represent a determination of the minimum subsistence level necessary for a disabled employee residing in that jurisdiction. The District of Columbia has determined to provide full reimbursement of the injured worker's medical expenses, 33 U.S.C. § 907 (1970 & Supp. V. 1975), to provide benefits for permanent and total disability (there is no time limit imposed and the benefits will continue indefinitely, 33 U.S.C. § 908(a) (1970 & Supp. V. 1975)), and to provide an annual upward adjustment of his disability benefits, 33 U.S.C. § 910(h) (Supp. V. 1975). In contrast, the Virginia agreement limited Mr. Thomas to a series of weekly payments amounting to $24,400.00. Va. Code, § 65.1-54 (1968) (amended 1970). In addition, the employer's responsibility to compensate the claimant for his medical expenses terminated after three years. Va. Code, § 65.1-88 (1968) (amended 1970). As an end result, the claimant has been adjudged permanently and totally disabled since March 4, 1976, but is receiving no compensation benefits or reimbursement for his extensive medical costs.

Surely in light of these considerations, it is only prudent to require evidence of an explicit and unambiguous legislative intent to bar extrajurisdictional compensation remedies. Such was the precise rule announced in *McCartin*:

> [T]here is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakeable language by a state legislature or judiciary would warrant our accepting such a construction. 330 U.S. 627-28 (citations omitted).[2]

The Wisconsin statute's bar of any other "common law of statutory right" is virtually indistinguishable from the

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[2] Although *McCartin* did not expressly override *Magnolia*, it has been widely interpreted as sanctioning a successive award in the absence of an express statutory prohibition to the contrary. 4 A. Larson, *The Law of Workmen's Compensation* § 85.40 (1970). In view of the number of states whose compensation statutes lack such an express prohibition, the decision pre-empts the applicability of *Magnolia* in nearly every jurisdiction. Indeed, Professor Larson notes in his treatise that due to the lack of such an express prohibition in Texas, the *Magnolia* doctrine may not even apply to the statute it originally govered. 4 A. Larson, *The Law of Workmen's Compensation* §85.30 (1970). *See Griffin* v. *Universal Underwriters Ins. Co.* 283 S.2d 748 (La. Sup. Ct. 1973), *cert. denied*, 416 U.S. 904 (1974). The progeny of *McCartin* envince a continuing willingness by many jurisdictions to compensate a worker who has earlier sought and received benefits for the same injury in another state. *Sager* v. *Royce Kershaw Co., Inc.*, 359 S.2d 398 (Ala. Civ. App. 1978); *Jordan* v. *Industrial Comm'n*, 571 P.2d 712 (Ariz. Ct. App. 1977); *American Mut. Ins. Co.* v. *Duvall*, 372 A.2d 263 (N.H. Sup. Ct. 1977); *Roberts* v. *United States Steel Corp., Fairless Works*, 311 A.2d 125 (N.J. Super. Ct. 1971); *Industrial Track Builders of America* v. *Lemaster*, 429 S.W.2d 403 (Ky. Ct. App. 1968); *Schenkel* v. *Tower Builders Co.*, 157 N.W.2d 204 (Mich. Sup. Ct. 1968); *Houle* v. *Stearns-Rogers Mfg. Co.*, 157 N.W.2d 362 (Minn. Sup. Ct. 1968); *Secrest Pipe Coating Co.* v. *Strickland* 447 P.2d 435 (Okla. Sup. Ct. 1968); *Chapman* v. *John St. John Drilling Co.*, 387 P.2d 462 (N.M. Sup. Ct. 1963); *Nevada Indus. Comm'n* v. *Underwood*, 387 P.2d 663 (Nev. Cup. Ct. 1963); *Texas Employers' Ins. Ass'n* v. *Miller*, 370 S.W.2d 12 (Tex. Civ. App. 1963); *Harrison Co.* v. *Norton*, 146 S.2d 327 (Miss. Sup. Ct. 1962); *McGehee Hatchery Co.* v. *Gunter*, 350 S.W.2d 608 (Ark. Sup. Ct. 1961) *Della Vecchia* v. *World Scope Publishing Co.*, 165 A.2d 872 (N.J. Super. Ct. 1960); *Lavoie's Case*, 135 N.E.2d 750 (Mass. Sup. Jud. Ct. 1956); *Cook* v. *Minneapolis Bridge Constr. Co.*, 43 N.W.2d 792 (Minn. Sup. Ct. 1950); *Cline* v. *Byrne Doors, Inc.*, 37N.W.2d 630 (Mich. Sup. Ct. 1949); *Industrial Indem. Exch.* v. *Industrial Accident Comm'n*, 80 Cal.2d 480, 182 P.2d 309 (Cal. Dist. Ct. App. 1947).

exclusion in Virginia of recovery at "common law or otherwise."

Finally, the lower Court's interpretation of the Virginia Act is unreasonable in light of the authorization by the Virginia legislature of a compensation remedy notwithstanding the claimant's earlier resort to another forum's compensation statute. The Virginia Workmen's Compensation Act fully embraces the concept of prior awards from different jurisdictions. Va. Code, § 65.1-61 (1975 Repl. Vol.). The only restriction imposed is that the second award be subject to a credit for all payments made under the previous statute in order to prevent double recovery. Undoubtedly, this proviso bears directly on the likely intent of the legislature as to the operation of the exclusive remedy provision. It is extremely doubtful that the Virginia legislature, in the same legislation, would condemn successive awards by another jurisdiction while reserving the same right for itself.

In this regard, *Magnolia* supports rather than detracts from the claimant's position. The Texas Act was unique in that it had been judicially construed to provide that "a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state." 320 U.S. at 435. The majority inferred from the lower Court's construction that Texas must also have intended to preclude a subsequent award by another state. This element wholly distinguishes *Magnolia* from the present controversy. Mr. Chief Justice Stone expressly limited the scope of the majority decision to this situation: "We have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas, ..." 320 U.S. at 443. Faithfulness to the central rationale of the *Magnolia* decision compels a contrary

conclusion where, as here, a prior District of Columbia award is permitted by the Commonwealth of Virginia.

In conclusion, the extent to which the statute of any one state may qualify or deny rights under the statute of another presents a question under the full faith and credit clause which this Court must determine for itself. *Alaska Packers Association* v. *Industrial Accident Commission of California,* 294 U.S. 532 (1935). In making the determination, this Court should attempt to accommodate the interest of the District of Columbia so that it shall not be compelled "to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state even though that statute is of controlling force in the Courts of the state of its enactment with respect to the same persons and events." *Pacific Employers Insurance Co.* v. *Industrial Accident Commission,* 306 U.S. 492, at 502 (1939). As there is no basis for interpreting the Virginia statute as exclusive of extrajurisdictional remedies, and since several factors militate against such a construction, the Virginia exclusive remedy provision should not stand as a bar to the enforcement of the District of Columbia Act.

B. Absent An Express Statutory Declaration, The Mere Approval By The Industrial Commission Of Virginia Of An Agreement For Temporary Disability Benefits Did Not Constitute A Final And Conclusive Determination Of All The Claimant's Rights To The Exclusion Of Any Further Remedy Under The Laws Of The District Of Columbia.

A workmen's compensation claim is not a single, indivisible "cause of action" for which a choice of law and forum must be made. On the contrary, a workman injured

in the course of his employment may be provided separate and distinct statutory remedies by two or more jurisdictions. Each remedy is limited to the terms of the enabling legislation, often by the condition that any recovery from another jurisdiction must be offset against any recovery under the statute in question. The receipt of benefits under one statute is not automatically an irrevocable choice of law. To hold otherwise would undermine the unique nature of a compensation recovery implicit in the Virginia statute and others like it which specifically endorse supplemental awards. Va. Code § 65.1-61 (1975 Repl. Vol.).[3]

Even in its highest form of judicial finality, a compensation award may only resolve the claimant's rights under that compensation statute. Unlike a common law judgment, an award cannot constitute a merger of the claimant's entire cause of action, including rights under another statute. The Industrial Commission of Virginia is an administrative tribunal whose authority is confined to a resolution of claims deemed within the provisions of the Virginia Workmen's Compensation Act. Therefore, as Judge Hall argued in his dissent in *Pettus:*

> [I]f the remedy under one state's law is not exclusive, there is no choice of law made. The administrative tribunal in State A determines *only* whether the claim falls under the workmen's compensation laws of State A; it does not, and could not, determine whether the workmen's compensation laws of State B, . . .587 F.2d at 634. *See also Newport News Shipbuilding and Dry Dock Co.*, v. *Director, OWCP,* 583 F.2d 1273 (1978); *Director, OWCP* v. *National Van Lines,* No. 78-1259, (D.C. Cir. 1979) (slip. op.).

This is the fundamental difference between *Magnolia* and *McCartin*. The majority in *Magnolia* put the Texas

[3] *See* Ala. Code § 25-5-25 (e) (1975); Ga. Code § 114-411 (1935); Ky. Rev. Stat. § 342.670 (1973 Repl. Vol.); Mass. Gen. Laws Ann. ch. 152, § 26 (1958); Md. Ann. Code art. 101, §§ 1-102 (1957) (Supp. 1974); N.D. Cent. Code ch. 65, § 01-01 (1960).

compensation award in the same posture as a judgment for personal injury at common law. Since "it has never been thought that an actionable personal injury gives rise to as many causes of action as there are states whose laws will permit a suit to recover for the injury . . . ." 320 U.S. at 445, the claimant was held barred from further remedies. However, the four dissenters argued forcefully that "the Texas award purported to do no more than to adjudicate his rights and duties under the Texas Act." 320 U.S. at 448.

Later decisions have endorsed the dissenters' view. Implicit in the *McCartin* result is that "proceedings under the industrial commission statutes are not like common law causes of actions that when transitory permit suit to be brought in either of two states . . . ." *Spietz* v. *Industrial Commission,* 251 Wis. 168, 28 N.W.2d 354 at 359 (1947). In a similar situation, *Carroll* v. *Lanza,* 349 U.S. 408 (1955), this Court held that Arkansas could adopt the Missouri Compensation Act or "supplement it or displace it with another." 349 U.S. at 414. The clear implication is that state workmen's compensation remedies do not afford single, indivisible causes of action in the nature of common law suits for damages.

Indeed, workmen's compensation represents a marked departure from the traditional common law structure. Frustrated by the procedural and substantive inadequacies of the common law system, states enacted specialized statutes in substitution of the common law. These statutes guarantee an expeditious remedy to the injured workmen. Therefore, absent an express statutory declaration, recovery under the Virginia Act could not bar District of Columbia rights. Even if Mr. Thomas' claim had been the object of a final award, forever resolving his right to temporary total disability compensation in Virginia, he should still have been able to supplement his remedy in the District of Columbia.

Two further elements cause the Virginia agreement to lack the degree of finality demanded by the *McCartin* court in order to constitute a full faith and credit bar. Initially, the Virginia agreement was not conclusive in its nature. The procedure by which Mr. Thomas acquired his rights did not rise to the level of finality characteristic of judicial or quasi-judicial proceedings. Benefits were paid to Mr. Thomas pursuant to a simple, informal agreement of the same effect as the settlement in *McCartin* (app., 53a). Provision is made in the Virginia Act for the negotiation and approval of such agreements in lieu of the formal adjudicative process. These agreements are encouraged by the state as a means of insuring that a subsistence level of benefits reaches the disabled employee as soon as possible. Missing from the Virginia agreement are the formality and finality of an adjudicatory process pursued to judgment. This distinction was of decisive significance in *Carroll* v. *Lanza*, 349 U.S. 408, 409 (1955), wherein this Court considered the effect of a recovery under a Missouri compensation statute which also purported to be exclusive of "all other rights and remedies . . . at common law or otherwise." The employer had made 34 weekly payments under the Missouri Act without a formal adjudication. The employer argued that he was therefore insulated from the employee's suit for damages in Arkansas. The Court responded that:

> The Court of Appeals thought *Magnolia Petroleum Co.* v. *Hunt* to be controlling. There the employee having received a *final award* for compensation in the forum of the injury returned to his home State and sued to recover under its Compensation Act. We held that the latter suit was precluded by the Full Faith and Credit Clause . . . Under that Act the statutory payments apparently start automatically on receipt of notice of the injury. While provision is made for an adjudication of disputes between an employee and his employer, no adjudication was sought or obtained here. 349 U.S. at 410-11 (citations omitted).

The impact of the distinction is clear. It can hardly be said that approval of the agreement by the Industrial Commission, largely a ministerial act, constituted a deliberate and considered adjudication. Nor can it reasonably be said that acceptance by the employee of benefits offered eight days after the accident constituted an informed and irrevocable choice of law operating as a *res judicata* bar to further recovery for the employee's injury. The Final Order by the District of Columbia evidences no disregard for a final determination made in the course of a state's "judicial proceedings," which the full faith and credit clause was designed to reach.

Additionally, the Virginia agreement lacked finality in its effect. Mr. Thomas' consent extended only to the commencement of temporary disability payments. The Virginia commission still retained jurisdiction in order to assess a new award for any residual permanent disability. Hence, the eventual extent of the claimant's rights remained thoroughly unresolved. This factor is in stark contrast to the *Magnolia* lump sum award which was expressly stated to constitute the only compensation for the employee's injury.

The Virginia agreement did not accomplish a final determination of all the claimant's rights. Under the rule announced in *McCartin*, the District of Columbia is therefore free to enforce its own statute. *Speitz* v. *Industrial Commission*, 251 Wis. 168, 28 N.W.2d 354 (1947). Even under the more strict *Magnolia* rule, the Virginia award, given full *res judicata* status, does not bar the claimant's other rights. It is well-settled that the approved agreement may only be *res judicata* in the District of Columbia to the same extent it is *res judicata* in Virginia. *Magnolia Petro-*

leum Co. v. *Hunt,* 320 U.S. 430 (1943). Since the Virginia award is, at most, a resolution of the claimant's rights to temporary total disability benefits, the District's award for permanent total disability is consistent with the Virginia award and constitutes no collateral attack on its validity.

CONCLUSION

It is evident that the exclusive remedy clause of the Virginia Act does not foreclose the claimant from seeking supplemental workmen's compensation benefits under the law of his domicile, the District of Columbia. The recent decisions of the Fourth Circuit have been an anomaly in this area of the law. It is certain that neither the full faith and credit clause of the United States Constitution nor the decisions enunciated by this Court in *Industrial Commission of Wisconsin* v. *McCartin* and *Magnolia Petroleum Co.* v. *Hunt* warrant the degree of restrictiveness that the Fourth Circuit has seen fit to impose.

It is commonly accepted that inherent in the full faith and credit clause are societal interests that are promoted by having a predictable and recognizable end to litigation. The accepted corollary of this is that these interests are only advanced when the claimant has been allowed due process of law in the pursuit of his remedies. Consequently, the doctrine of *res judicata* has only been applied to a successive action, where the issues presented have been, or should have been, fully litigated in the prior action.

In the instant proceeding, Mr. Thomas both lived and performed the majority of his work in the District of Columbia. His employer, The Washington Gas Light Company, was a corporation doing business in the District of Columbia. Recognizing the obvious advantage in the Virginia Act, the employer seized on the fortuity of the injury occurring in Virginia and directed its employee to that forum to seek compensation. In the non-adversarial proceeding that followed, Mr. Thomas agreed to accept the payments for temporary total disability volunteered by the Washington Gas Light Company.

This is not the scenario of litigation usually contemplated for application of the doctrine of *res judicata.* The Fourth Circuit, in applying the doctrine here, has committed reversible error by extending the effect of the Virginia award beyond even its own purported scope.

Furthermore, the *Magnolia* decision, on which the Fourth Circuit relies, does not mandate or support the interpretation given the Virginia exclusive remedy provision. In reaching its solution, that Court was faced with a final, non-open-ended award from a Texas court. Under such circumstances, the exclusive remedy provision could more readily be considered a final adjudication of the claim raised without doing violence to the due process principles inherent in the full faith and credit clause.

This case is more analogous to *McCartin,* where this Court limited the Illinois exclusive remedy clause to apply only to other common law or statutory rights in Illinois. The Illinois award also was not intended to be final and conclusive of all the claimant's rights and accordingly, this Court declined to impose the doctrine of *res judicata* and allowed a supplemental claim.

The direct result of the action taken by the Fourth Circuit has been a frustration of the legislated policy of the District of Columbia. If the decision of the Fourth Circuit is left undisturbed, a totally disabled worker, whose claim has been adjudged compensable in the District of Columbia, will be left without any hope for relief.

The overwhelming conclusion must be that the Fourth Circuit has erred in its interpretation of the exclusive remedy provision of the Virginia Act. Therefore, it is respectfully requested that this Court enter an Order reversing the United States Fourth Circuit Court of Appeals

and reinstating the District of Columbia final award. In so doing, this Court will have removed the unconstitutional pall that looms over every District of Columbia employee who must cross the boundaries of these local jurisdictions in his regular course of employment.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-116

In the Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-116

HALLEY I. THOMAS, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported; it is noted in the table at 598 F.2d 617. The final opinion of the Benefits Review Board (Pet. App. 3a-8a) is reported at 9 B.R.B.S. 760. The Board's earlier opinion, remanding the case to the administrative law judge for further consideration (Pet. App. 16a-19a), is unreported. The administrative law judge's original interlocutory (Pet. App.

34a-50a) and final opinions (Pet. App. 20a-32a) and his supplemental opinion on remand from the Board (Pet. App. 9a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1979. The petition for a writ of certiorari was filed on July 24, 1979, and was granted on November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Full Faith and Credit Clause bars an award of workers' compensation in one jurisdiction following an award in another jurisdiction whose statute states only in general terms that the benefits it provides are the exclusive remedy against the employer.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Article IV, Section 1 of the Constitution provides in relevant part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

2. 28 U.S.C. 1738 provides in relevant part:

> Such Acts, records and judicial proceedings [of a state court] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

3. Section 1 of the District of Columbia Workmen's Compensation Act of May 17, 1928, ch. 612, 45 Stat. 600, 36 D.C. Code § 501 (1973), provides:

> The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

4. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, provides in relevant part:

> (a). The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *.

5. The Virginia Workmen's Compensation Act, Va. Code §§ 65.1-1 to 65.1-152 (1973 Repl. Vol. & 1978 Cum. Supp.), provides in relevant part:

> § 65.1-40. Employee's rights under Act exclude all others.—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

STATEMENT

Petitioner, a resident of the District of Columbia since 1949, was hired by respondent Washington Gas Light Company as a heavy laborer at its employment office in Washington, D.C., in January 1970. Although petitioner sometimes worked in the Virginia and Maryland suburbs of the District of Columbia, approximately 60% of his duties were performed in the District (A. 36a-37a).

On January 22, 1971, petitioner was breaking concrete with an air hammer in Arlington, Virginia, when he sustained a disabling injury to his back. He has been totally disabled ever since (A. 31a).[1]

[1] Less than a year after the injury, petitioner attempted to perform clerical work in one of respondent's offices. He was unable to do the necessary stooping and bending, however, and was forced to give up the job (A. 38a).

Two weeks after the injury, while still hospitalized, petitioner executed an Industrial Commission of Virginia form entitled "Memorandum of Agreement as to Payment of Compensation," under which respondent agreed to pay him compensation of $62 per week for temporary total disability pursuant to Virginia's workers' compensation law (A. 37a, 49a). On March 15, 1971, the Industrial Commission of Virginia approved the agreement as an award of indefinite duration for temporary total incapacity. Petitioner continued to receive these benefits until they reached the maximum amount payable under Virginia law, Va. Code § 65.1-54 (1973) (A. 45a, 49a). Petitioner is now entitled to no further benefits, either periodic compensation for continuing disability or medical treatment, under Virginia law.

On September 24, 1974, petitioner notified the Deputy Commissioner of the Department of Labor's Office of Workers' Compensation Programs (OWCP) of his intention to seek compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, as adopted by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501-502 (1973). Respondent defended on the ground that the Virginia award barred the District of Columbia claim on res judicata principles. The case was submitted for resolution to an administrative law judge of the United States Department of Labor, who rejected respondent's contention that the Full Faith and Credit Clause of the Constitution (Art. IV, § 1) gave the Virginia

award the res judicata effect of barring an additional claim under the District of Columbia Act (A. 50a). Accordingly, the administrative law judge awarded petitioner benefits for permanent total disability from the date of his injury (A. 31a).[2] The amounts paid under the Virginia statute were credited against this award (*ibid.*). On appeal, the Benefits Review Board remanded the case for the taking of additional evidence unrelated to the "full faith and credit" defense (*id.* at 18a). After an additional hearing, the administrative law judge issued a Supplemental Decision and Order again awarding benefits for permanent total disability (*id.* at 9a-13a). The Benefits Review Board affirmed, holding that the Virginia award did not bar the District of Columbia award (*id.* at 8a).[3]

The court of appeals reversed per curiam (A. 2a), relying on *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), cert. denied, No. 78-1739 (Oct. 1, 1979). The facts in *Pettus* were similar to those in this case. The claimant, a resident of the District of Columbia, was injured

[2] Respondent denied liability on the additional ground that petitioner's claim was not timely filed, but the administrative law judge rejected this defense as well (A. 12a-13a, 29a, 31a).

[3] Pursuant to the LHWCA, the Director of OWCP is a party before the Benefits Review Board defending the award and is a party by right in the court of appeals. See *United Brands Co.* v. *Melson*, 569 F.2d 214 (5th Cir. 1978); *Director, OWCP* v. *National Van Lines, Inc.*, No. 78-1259 (D.C. Cir. Nov. 13, 1979), slip op. 4 n.6. But see *I.T.O. Corp.* v. *Benefits Review Board*, 542 F. 2d 903, 906-907 (4th Cir. 1976). See also *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977).

while working at National Airport in Virginia. He was granted workers' compensation payments by the Industrial Commission of Virginia, but the payments were terminated by the Commission on the ground that the claimant had unjustifiably refused to undergo back surgery. The claimant then sought and obtained benefits under the District of Columbia Workmen's Compensation Act. The Fourth Circuit, with one judge dissenting, reversed this award on the ground that it violated the Full Faith and Credit Clause, as implemented by 28 U.S.C. 1738, in failing to give proper effect to the judgment of the Virginia Commission. The court relied on *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), for the proposition that a "second and separate proceeding in another jurisdiction upon the same injury after a prior recovery in another State * * * was precluded by the Full Faith and Credit Clause." 587 F.2d at 630. The court held that this proposition was not affected by this Court's subsequent decision in *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), because the first award in *McCartin* was " 'different in its nature and effect' " from the first award in *Magnolia* and because the second proceeding in *McCartin* "was virtually under stipulations of consent." 587 F.2d at 631.

SUMMARY OF ARGUMENT

A. In *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), this Court held that a Texas workers' compensation award acted as a bar to a later supplemental award under the Louisiana workers' compensation statute despite the fact that the amounts

paid under the Texas award had been credited against the amounts awarded in Louisiana. Although the court of appeals held that *Magnolia* is controlling, that decision has no application here. First, the Court's opinion in *Magnolia* explicitly disavowed any consideration of the situation presented in this case, where the law of the first state, Virginia, permits the state to grant supplemental awards itself. Moreover, the effect of *Magnolia* was severely limited by *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), where the Court held that the Full Faith and Credit Clause barred a subsequent award in another state under *Magnolia* only when the first state, by "unmistakable language" in its statutes or court decisions, explicitly intended that its award preclude supplemental relief under the laws of other jurisdictions.

The Virginia workers' compensation statute contains no "unmistakable language" barring a supplemental award in a second jurisdiction. The general exclusivity provision in the Virginia statute is akin to provisions that exist in all workers' compensation statutes and, indeed, to the provision considered by the Court in *McCartin*. These provisions are generally intended to make the workers' compensation remedy exclusive *within* the state and to preclude ordinary tort actions against the employer arising out of the accident. Other than in this case and *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), cert. denied, No. 78-1739 (Oct. 1, 1979), a case decided by the same panel, no court has ever construed the Virginia statute to bar the applicability of other states' workers' compensation schemes, and

analogous provisions in other jurisdictions have uniformly been held not to have that effect. Accordingly, *McCartin* compels reversal of the decision below.

B. The policies underlying the Full Faith and Credit Clause and workers' compensation statutes suggest that supplemental awards in a second state should be permitted. A second award ordinarily does not infringe on any interest of the first state, whereas barring the award prevents the second state from effectuating the beneficent interests protected by its statute. This is particularly true where (as here) the injured employee is a resident of the second state, which has an important interest in ensuring that such persons do not become public charges. Workers' compensation statutes have traditionally been liberally construed in furtherance of the overriding policy, common to all such statutes, of providing adequate compensation for injured workers.

Indeed, there is room to argue that the workers' compensation area should be considered an exception to general principles of full faith and credit. Ordinarily, the interests of a state as expressed in its statutes and court decisions are given effect, when litigation occurs in a different forum, by the application of choice of law principles. Thus, a judgment of that forum presumably embodies a consideration of the policies of all interested states, and it should be given full effect nationwide. In workers' compensation cases, however, there is no choice of law to vindicate the interests of states other than the forum state. State administrative commissions usually lack jurisdiction to hear claims based on the statutes of another state. See, *e.g.*, Va. Code § 65.1-92 (1973).

The Full Faith and Credit Clause should not prevent a state from ensuring that its legitimate interests are protected by granting an award under its own workers' compensation law simply because an award has been rendered in another state's proceeding.

Finally, the decision of the court of appeals forces a worker to settle for the benefits granted by the first state in which an award is made. This rule has the practical effect of encouraging employers to induce injured employees to file claims in jurisdictions that will not grant them maximum benefits. Because a supplemental award must credit the employer with benefits previously paid pursuant to the first award, the question presented in this case arises only when the injured employee initially chooses the "wrong" forum. A worker who has recently been seriously injured is in no position to make an informed and considered judgment about which jurisdiction will offer him the largest benefits; his immediate concern is to have *some* benefits begin as quickly as possible. The employer, on the other hand, generally is aware of which state's compensation law is most favorable to its interests. A rule permitting successive awards is an equitable solution, because it does no more than permit an employee to gain the benefits that he would have obtained in the first instance in a single state if he had been able to make an informed choice of forum at the time he filed his claim.

ARGUMENT

THE FULL FAITH AND CREDIT CLAUSE DOES NOT PREVENT PETITIONER FROM RECEIVING AN AWARD UNDER THE DISTRICT OF COLUMBIA WORKERS' COMPENSATION STATUTE

A. The Court Of Appeals Failed To Apply The Controlling Decision Of This Court In *Industrial Commission* v. *McCartin*

This Court first considered the availability of successive workers' compensation awards in two different jurisdictions in *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943). There, a Louisiana resident injured while working in Texas was awarded benefits under the Texas Workmen's Compensation Law. He subsequently brought suit in Louisiana under Louisiana's Workmen's Compensation Law and was awarded the benefits provided in that statute, subject to credit for the amount of the Texas payments. This Court reversed, holding that the Texas compensation award was a bar to recovery in the Louisiana proceeding.

The Court reasoned that Louisiana was required to give the same effect to the Texas judgment that Texas courts would have given it. Because the first award was a final adjudication of the claimant's rights in Texas, he could not recover any further compensation for his injury, even in a different state. The Court found it particularly significant that the Texas statute provided that an employee could not obtain a compensation award in Texas if he had already claimed and received compensation under the laws of another state. 320 U.S. at 435. The Court

added, however, that the case presented "no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas." 320 U.S. at 443.

The apparent practical impact of the *Magnolia* decision was that no awards could be made under a state workers' compensation statute if an award had already been made in another state concerning the same injury. This position was in conflict with the prevailing law at the time,[4] and the decision was criticized by commentators.[5] Little more than three years later, however, the effect of *Magnolia* was "severely limited" (see G. Stumberg, *Principles of Conflicts of Laws* 221 (3d ed. 1963)) by this Court's unanimous decision in *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947).

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[4] See generally 4 A. Larson, *The Law of Workmen's Compensation*, § 85.10 (1978); *Restatement of Conflict of Laws* § 403 (1934); *Magnolia Petroleum Co.* v. *Hunt*, *supra*, 320 U.S. at 458 n.7 (Black, J., dissenting). See, *e.g.*, *McLaughlin's Case*, 274 Mass. 217, 174 N.E. 338 (1931); *Price* v. *Horton Motor Lines, Inc.*, 201 S.C. 484, 23 S.E.2d 744 (1942); *Interstate Power Co.* v. *Industrial Commission*, 203 Wis. 466, 234 N.W. 889 (1931). But see *Magnolia Petroleum Co.* v. *Hunt*, *supra*, 320 U.S. at 441 n.5.

[5] See, *e.g.*, Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1228-1230 (1946); Wolkin, *Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern*, 92 U. Pa. L. Rev. 401 (1944) (hereinafter cited as Wolkin). See also Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co.* v. *Hunt*, 44 Colum. L. Rev. 330 (1944) (hereinafter cited as Cheatham).

In *McCartin*, an Illinois resident was injured while working in Wisconsin. He first sought benefits under Illinois law, and a settlement of his claim was reached with the employer and approved by the Illinois Industrial Commission. The settlement agreement, signed prior to the *Magnolia* decision, stipulated that the claimant's rights under Wisconsin law were not affected. The claimant then was granted a workers' compensation award by the Wisconsin Industrial Commission, which credited the amounts paid under Illinois law against the award. Relying on *Magnolia*, the Wisconsin courts set aside the award. This Court reversed and reinstated the award.

The Court held that *Magnolia* would be controlling only "[i]f it were apparent that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury * * *." 330 U.S. at 626. The Court found, however, that the Illinois award was "different in its nature and effect from the Texas award" in *Magnolia*. *Id.* at 627. The Texas benefits were "made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state." *Id.* at 626. The Illinois statute, by contrast, provided that "[n]o common law or statutory right to recover damages * * * other than the compensation herein provided * * * shall be available to any employee who is covered by the provisions of this act, * * *." *Id.* at 627. The Court held that this language indicated that the statute was meant to be an exclusive remedy in Illinois, but that it was not "designed to preclude any

recovery by proceedings brought in another state * * *." *Id.* at 627-628. The Court explained (*id.* at 628; emphasis added):

> [I]n light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, * * * we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. *Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction.* Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play.

The Court also noted that the express reservation in the settlement agreement lent additional weight to its decision, but, contrary to the suggestion of the court of appeals in *Pettus* (587 F.2d at 631), it did not rely on that fact as the basis for its ruling. Instead, the Court found that the reservation "spells out what we believe to be implicit in that Act—namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state." 330 U.S. at 630.

McCartin has consistently been understood to permit successive awards of workers' compensation unless the state granting the first award has clearly indicated that its award is intended to preclude a subsequent award under the law of another state. See generally 4 A. Larson, *The Law of Workmen's Compensation* §§ 85.00-85.40 (1978). If the courts or administrative bodies of the first state do not consider their decision to bar an award under a sister state's statute, then the sister state in awarding supplemental benefits is not failing to give "full faith and credit" to any aspect of the first state's judgment, the problem that led to the *Magnolia* decision. As we show below, nothing in the Virginia workers' compensation statute or in decisions of the Virginia courts suggests that a Virginia award is intended to have such a preclusive effect. Accordingly, we submit that the court of appeals erred under *McCartin* in holding that the award of benefits under the District of Columbia Act failed to give full faith and credit to the decision of the Virginia Commission.

At the outset, it is clear that the court of appeals erred in concluding that the decision in this case is controlled by *Magnolia*. As mentioned earlier (see page 12, *supra*), the Court in *Magnolia* explicitly disclaimed deciding what effect would have to be given to the Texas award if Texas law did not provide that an award in another state precluded a Texas award. 320 U.S. at 443. That situation, not considered in *Magnolia*, is presented here. Va. Code § 65.1-61 (1973) provides in part: "if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for

the same injury greater than is provided for in this Act." This provision establishes that workers' compensation payments already granted in another jurisdiction must be credited against an award made for the same injury under the Virginia statute. The provision thus plainly presupposes that Virginia law allows a workers' compensation award following an award in another state. Hence, in direct contrast to the Texas law considered in *Magnolia*, Virginia does not consider a workers' compensation award in another state to prohibit issuance of its own award.

Virginia's treatment of foreign awards in this fashion strongly indicates that it has no policy requiring extension of the exclusivity provisions of its statute to preclude awards in other states. Common sense suggests that Virginia would not intend its award of workers' compensation to prevent a supplemental award in a second jurisdiction if Virginia itself does not treat another state's award as preclusive. Because the Virginia legislature recognized in Section 65.1-61 that Virginia itself will sometimes grant a second award, it is reasonable to expect that the legislature would have expressly provided that other states could not treat Virginia awards in a reciprocal fashion if that were its intent.

The Virginia statute, however, contains no such express provision.[6] Va. Code § 65.1-40 (1973) does con-

[6] Because there is no apparent state interest in precluding a recovery under a sister state's workers' compensation statute, it is not surprising that most states have not enacted such provisions. Nevada, however, has enacted a preclusion provision and its clarity stands in sharp contrast to the lack of any specific provision under Virginia law. Nev. Rev. Stat. § 616.525 (1967) provides (emphasis added):

> *Acceptance of compensation, benefits under chapter by employee injured out of state constitutes release of employer and waiver of common law or statutory remedy provided in another state.*
>
> 1. Anything to the contrary in this chapter notwithstanding, if an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside this state, and he, or his dependents in case of his death, accepts any compensation or benefits under the provisions of this chapter, the acceptance of such compensation shall constitute a waiver by such employee or dependents of all rights and remedies against the employer at common law *or given under the laws of any other state*, and shall further constitute a full and complete release of such employer from any and all liability arising from such injury or death.

See also 42 U.S.C. 1651 (c); 5 U.S.C. 8173.

tain a general clause providing that acceptance of workers' compensation benefits "exclude[s] all other rights and remedies of such employee * * * at common law or otherwise, on account of such injury." But this language is substantially identical to a section of the Illinois law held in *McCartin* not to preclude compensation under other state schemes.[7] Indeed, virtually all workers' compensation statutes contain provisions similar to Section 65.1-40, because workers' compensation is intended as a substitute for common law tort recoveries against the employer for work-related injuries. In return for making workers' compensation

[7] The Illinois statute provided that "[n]o common law or statutory right to recover damages * * *, other than the compensation herein provided, shall be available." *Industrial Commission* v. *McCartin*, *supra*, 330 U.S. at 627.

payments, an employer is insulated by these provisions from tort liability for the same injury. There is no reason, however, to extend this protection to the workers' compensation laws of another state. Hence, Virginia state courts have not interpreted the exclusivity provisions of the statute literally to exclude all other remedies that an employee might have,[8] and they have certainly never held that a Virginia award precludes resort to the workers' compensation remedies of a sister state.[9]

Similarly, the federal appellate courts, with the exception of the panel in the *Pettus* case, have held that the Virginia statute does not bar a subsequent recovery under other workers' compensation laws. In *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 583 F.2d 1273 (4th Cir. 1978), cert. de-

[8] See *Fauver* v. *Bell*, 192 Va. 518, 526, 65 S.E.2d 575, 580 (1951), where the Virginia Supreme Court held that a workers' compensation award did not preclude a lawsuit against a party other than the employer.

[9] Indeed, the action of the Virginia Commission in approving the agreement in this case suggests that the Commission did not understand its action to bar recovery under the District of Columbia statute. The benefits available to petitioner in the District are greater than those under the Virginia statute. Hence, an action by the Commission approving the Virginia agreement at the expense of barring a future award in the District would not have been in petitioner's best interest. The Commission would thus have violated Va. Code § 65.1-93 (1973), which provides that an agreement may be approved "only when the Commission * * * is clearly of the opinion that the best interests of the employee or his dependents will be served thereby."

nied, 440 U.S. 915 (1979), the court held that the filing of a claim for workers' compensation under Virginia law, which was denied, did not bar a subsequent award under the Longshoremen's and Harbor Workers' Compensation Act. The court specifically found that the nature of the Virginia exclusivity provision compelled the conclusion that *McCartin*, not *Magnolia*, controlled the consideration of any full faith and credit argument. 583 F.2d at 1278.[10] And in *Director, OWCP* v. *National Van Lines, Inc.*, No. 78-1259 (Nov. 13, 1979), slip op. 14-16 n. 31, the D.C. Circuit explicitly rejected *Pettus* in holding that the Virginia statute did not preclude a second award under the District of Columbia statute after an award has been made in Virginia.

The highest courts of several states have uniformly held that an exclusivity provision phrased in general terms, as is the Virginia statute, lacks the "unmistakable language" required by *McCartin* to support the conclusion that an award under the statute is intended to exclude supplemental relief under the laws of other jurisdictions. See, *e.g.*, *Griffin* v. *Universal Underwriters Insurance Co.*, 283 So.2d 748 (La. 1973), cert. denied, 416 U.S. 904 (1974) (prior Texas award and subsequent judgment suspending

[10] In a supplemental decision on denial of petition for rehearing, the *Pettus* court distinguished *Newport News* on the ground that the claim there had been dismissed by the Virginia Commission on jurisdictional grounds and thus there was no Virginia decision on the merits that barred the subsequent claim. 587 F. 2d at 635.

benefits under it not exclusive of Louisiana supplemental award);[11] *Wood* v. *Aetna Casualty & Surety Co.*, 260 Md. 651, 273 A.2d 125 (1971) (Maryland award is not exclusive of additional award under another jurisdiction's compensation law); *Stanley* v. *Hinchliffe & Kenner*, 395 Mich. 645, 238 N.W.2d 13 (1976) (prior California award not exclusive of Michigan supplemental award); *Cook* v. *Minneapolis Bridge Construction Co.*, 231 Minn. 433, 43 N.W.2d 792 (1950) (prior North Dakota award not exclusive of Minnesota supplemental award); *Cramer* v. *State Concrete Corp.*, 39 N.J. 507, 189 A.2d 213 (1963) (prior New York award not exclusive of New Jersey supplemental award).[12] The federal ap-

[11] The court thus held that the very Texas statute that had been considered in *Magnolia* should not be interpreted to bar a second award in another state in light of *McCartin*. Cf. *Chapman* v. *John St. John Drilling Co.*, 73 N.M. 261, 387 P.2d 462 (1963).

[12] Accord, *Jordan* v. *Industrial Commission*, 117 Ariz. 215, 571 P.2d 712 (Ariz. App. 1977); *City Products Corp.* v. *Industrial Commission*, 19 Ariz. App. 286, 506 P.2d 1071 (1973); *Agee* v. *Industrial Commission*, 10 Ariz. App. 1, 455 P.2d 288 (1969); *McGehee Hatchery Co.* v. *Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Reynolds Electrical & Engineering Co.* v. *Workmen's Compensation Appeals Board*, 65 Cal. 2d 429, 55 Cal. Rep. 248, 421 P.2d 96 (1966); *Industrial Indemnity Exchange* v. *Industrial Accident Commission*, 80 Cal. App. 2d 480, 485, 182 P.2d 309, 312 (1947); *Industrial Track Builders* v. *Lemaster*, 429 S.W.2d 403 (Ky. 1968); *Ryder* v. *Insurance Co. of North America*, 282 So.2d 771 (La. App. 1973); *Lavoie's Case*, 334 Mass. 403, 135 N.E.2d 750 (1956); *Hubbard* v. *Midland Constructors, Inc.*, 269 Minn. 425, 426 n.1, 131 N.W.2d 209, 211 n.1 (1964); *Sorenson* v. *Standard Construction Co.*, 238 Minn. 68, 55 N.W.2d 630 (1952); *Harrison Co.* v. *Norton*, 244 Miss. 752, 146 So.2d 327 (1962); *Bekkedahl* v. *North Dakota Workmen's Compensation Bureau*, 222 N.W. 2d 841 (N. Dak. 1974); *Spietz* v. *Industrial Commission*, 251 Wis. 168, 28 N.W.2d 354 (1947).

pellate courts have generally concurred. See, *e.g.*, *Director, OWCP* v. *National Van Lines*, *supra*; *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, *supra*; *Director, OWCP* v. *Boughman*, 545 F.2d 210, 211 (D.C. Cir. 1976); *Sade* v. *Northern Natural Gas Co.*, 458 F.2d 210, 215 (10th Cir. 1972).[13]

The one exception to this long line of authority is *Gasch* v. *Britton*, 202 F.2d 356 (D.C. Cir. 1953). In that case, a divided court of appeals held that the Maryland Workmen's Compensation Law barred an action under the District of Columbia statute after an award had been made in Maryland. The court's construction of Maryland law, however, was later specifically repudiated by the Maryland courts in *Wood* v. *Aetna Casualty & Surety Co.*, *supra*, which held that the Maryland exclusivity provision does not bar a second award in another state.[14] Moreover,

[13] An analogous issue is whether coverage under the Longshoremen's and Harbor Workers' Compensation Act precludes an award under a state workers' compensation statute. This issue is now before the Court in *Sun Shipbuilding and Dry Dock Co.* v. *Pennsylvania*, probable juris. noted, No. 79-343 (Jan. 7, 1980).

[14] The Maryland exclusivity provision explicitly provided that an award under the act "shall be in lieu of any and all rights of action whatsoever against any person whomsoever." 202 F.2d at 358-359.

the District of Columbia Circuit is now clearly in accord with other courts in construing *McCartin* to allow a second workers' compensation award unless the first state's statute contains "unmistakable language" opposing that result. See *Director, OWCP* v. *National Van Lines, supra.*

In sum, there is no basis for holding the res judicata effect of Virginia's general exclusivity provision to be any greater than that of the numerous other workers' compensation statutes considered above. Accordingly, the court of appeals failed to follow *McCartin* in concluding that the Virginia workers' compensation law excludes a second award under the workers' compensation statute of a sister state, and thus the Full Faith and Credit Clause does not bar the District of Columbia award made to petitioner.

B. The Decision Of The Court Of Appeals Frustrates The Legitimate Policy Interests Of The States In Administering Workers' Compensation Programs

Workers' compensation statutes are designed to provide financial and medical benefits to employees injured in the course of their employment. Rather than having the state and its taxpayers support these employees who are no longer able to work, workers' compensation places the burden of support, within statutory limitations, on the employer and indirectly on the consumers who purchase the employer's products.[15] This Court has traditionally given great deference to a state's strong interest in applying its own workers' compensation statute. Thus, in *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493 (1939), the Court permitted the state where the injury occurred to apply its workers' compensation law even though the employee was regularly employed and resided in another state. See also *Carroll* v. *Lanza*, 349 U.S. 408 (1955). And, of course, in *McCartin*, the Court held that a state's interest in applying its workers' compensation laws permits it to grant an award under those laws even after an award has been made to the employee in another state.

The situation presented in this case does not require a court to weigh the competing interests of two states and make a difficult choice as to which state's policy should take precedence. Unlike in *Carroll* v. *Lanza, supra*, there is no conflict in the respective policies underlying the Virginia and District of Columbia statutes. Those policies are identical—to compensate an employee, without proof of fault, for injuries suffered on the job. The only relevant differences between the District of Columbia and Virginia statutes are the Virginia limitations on the amount and duration of the award, but these limitations do not require that a choice be made between the two statutes. Both can be applied without offending the policy of either state.

---

[15] Respondent is "self-insured" (see 33 U.S.C. 932) and thus the award in this case provides that it make payments directly to petitioner (A. 31a).

The rule adopted by the court of appeals, however, defeats the District of Columbia interest embodied in the legislative judgment that the amount of benefits provided in the LHWCA is appropriate for injured employees who are covered by the District of Columbia workers' compensation statute.[16] The fact that those amounts differ from the amounts provided under the Virginia statute may be a consequence of differences in local economic and social conditions. See Wolkin, *supra*, at 407. This interest of the District of Columbia in providing the benefits authorized by its statute to an injured employee is not diminished simply because another state has made a lesser award.

The importance of the District of Columbia's interest is demonstrated by the facts of this case. Because of the limitation of the Virginia statute, petitioner is no longer receiving any workers' compensation benefits although he is still unable to work. Because he is a District of Columbia resident, the burden of supporting him, to the extent state support is necessary,

[16] Because respondent carries on employment in the District of Columbia and there is a "substantial connection" (*Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 476) between the District and the employment relationship with petitioner, petitioner's injury is within the jurisdiction of the District of Columbia Workmen's Compensation Act (A. 49a).

Respondent has suggested (Br. in Opp. 12-13) that jurisdiction is precluded by the version of Section 3(a) of the LHWCA in effect at the time of petitioner's injury. But it has long been recognized that the jurisdictional limitations of this section, relating to injury on navigable waters and lack of coverage under state law, do not apply to the District of Columbia Act. These limitations are inconsistent with the explicit jurisdictional scope of 36 D.C. Code § 501 (1973); to apply them would make the District of Columbia statute "wholly inoperative and result in an absurdity." *Travelers Insurance Co.* v. *Cardillo*, 141 F.2d 362, 364 (D.C. Cir. 1944).

falls upon the District of Columbia—a burden that would not have been imposed had the District of Columbia been permitted to apply its own workers' compensation law. Thus, the District of Columbia's strong interest in preventing its residents who are injured while working from becoming dependent on the District for support is stymied by the preclusive effect given to the Virginia award. Cf. *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 294 U.S. 532, 542 (1935). Yet this result does not contribute to vindicating any Virginia interest. No Virginia policy, either underlying the workers' compensation statute or otherwise, is implicated in the decision whether to permit the subsequent District of Columbia award.[17] Moreover, permitting successive awards would not create uncertainty or confusion in an area where uniformity is essential, such as the validity of a marriage. See *Williams* v. *North Carolina*, 317 U.S. 287, 299-300 (1942). The court of appeals' holding thus prevents the effectuation of a considered state policy without furthering any countervailing state or federal interest.

[17] The limitation of liability in the Virginia statute may represent a Virginia policy of encouraging companies to locate in Virginia. This policy is not offended by allowing the District of Columbia award to stand. The employer's liability for additional benefits under the subsequent District of Columbia award is purely a consequence of the fact that jurisdiction exists under the District of Columbia workers' compensation statute—the connection with Virginia is of no relevance. If petitioner had refused to accept a Virginia award and had instead chosen to pursue his rights under the District of Columbia statute, he unquestionably would have been entitled to the greater award. See page 29, *infra*.

Successive workers' compensation awards in two states may seem anomalous in light of the preclusive res judicata effect given to judgments in ordinary tort claims and other suits, but this result is proper because workers' compensation actions are themselves an anomaly. Indeed, several commentators have argued that workers' compensation actions should be classified as a specific exception to the general principles requiring one state to give full faith and credit to the judgments of another state. See Cheatham, *supra*, at 341-346; Wolkin, *supra*, at 411; Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Colum. L. Rev. 153, 176-177 (1949). See also A. von Mehren and D. Trautman, *The Law of Multistate Problems; Cases and Materials on Conflict of Laws* 1460 (1965). Under this theory, a state would not have the power, even by using "unmistakable language" (*Industrial Commission* v. *McCartin*, *supra*, 330 U.S. at 628), to preclude a second state from granting a supplemental workers' compensation award under its own statute.

There are several practical considerations that support such a rule. First, as noted above, granting a supplemental award does no violence to the policies of the first state while enabling the second state to effectuate its own policies. Second, the overriding goal of compensating injured workers, which is common to both states' statutes, is advanced by the supplemental award. The importance of protecting workers is demonstrated by the existence of rules of construction in

favor of coverage of the injured worker. See *Industrial Commission* v. *McCartin*, *supra*, 330 U.S. at 628. Application of a workers' compensation statute certainly should not be barred when there is no doubt as to coverage under the statute. Third, workers' compensation awards are more than a lump sum payment to an employee; they involve a continuing relationship of support in which the state of the worker's residence has a particular interest. See Cheatham, *supra*, at 343-344.

Apart from these practical considerations, there is a strong theoretical basis for treating workers' compensation awards as an exception to general full faith and credit principles. The purpose of the Full Faith and Credit Clause is to smooth the workings of our federal system by mandating, *inter alia*, that the final judgment of one state court shall have the same effect throughout the country. *Sherrer* v. *Sherrer*, 334 U.S. 343, 354-355 (1948). Chaos would ensue if each state could consider a cause of action anew without regard to a prior decision in another state. This policy of full faith and credit necessarily is pursued at some cost to the interests of individual states. However, those interests are not wholly ignored; ordinarily they are taken into account through the mechanism of choice of law. In the trial of an action involving contacts with more than one state, the laws of the states other than the forum state may be applied, depending upon the competing interests of the various states. Thus, even when a state is not the forum state, it has had an opportunity to have

its interests vindicated through choice of its law, and it is then bound to give full faith and credit to the judgment of the forum state.

In the workers' compensation area, the state seeking to make the second award generally has never had an opportunity to have its interests vindicated in the first proceeding. In most cases, the forum state is unable to apply the workers' compensation law of another state, because these cases are typically considered in the first instance by an administrative tribunal that has no jurisdiction to adjudicate questions under other states' statutes. In this case, for instance, Va. Code § 65.1-92 (1973) limits the jurisdiction of the Industrial Commission of Virginia to "questions arising under this Act." [18] Accordingly, only by granting a supplemental award itself can a state ensure that the interests embodied in its own workers' compensation statute are given due consideration. See generally Cheatham, *supra*, at 344; Wolkin, *supra*, at 406-407; Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Colum. L. Rev. 153, 176-177 (1949). See also *Semler* v. *Psychiatric*

[18] This restrictive jurisdiction is quite logical. Because a workers' compensation award involves not only money, but also various administrative aspects such as supervision of periodic payments and medical care that vary widely from state to state, it would be quite unworkable for one state's system to implement an award pursuant to another state's statute. See Larson, *Constitutional Law Conflicts and Workmen's Compensation*, 1971 Duke L.J. 1037, 1039. Nothing in the Constitution, however, prevents a state from adjudicating questions under the workers' compensation statute of another state. *Crider* v. *Zurich Insurance Co.*, 380 U.S. 39 (1965).

Institute, 575 F.2d 922, 929-930 n.41 (D.C. Cir. 1978).

Finally, the practical consequence of the court of appeals' decision is to create an unfortunate opportunity for employers to engage in overreaching. See Cheatham, *supra*, at 345. Because credit is given for the first award, the question presented in this case arises only when the employee does not first receive a workers' compensation award in the most advantageous jurisdiction available.[19] Any employee aware of his options would bring his claim initially in the jurisdiction that provides the best benefits, and there would be no occasion for a supplemental award. The rule of the court of appeals simply binds an employee to his first award. The harshness of this rule is apparent. An injured employee often is in no position to determine whether workers' compensation benefits are available in more than one jurisdiction and, if they are, to make an informed choice in which jurisdiction to pursue his claim. The employee's immediate concern is his loss of income, and he is likely to accept any reasonable proposal that would lead to the receipt of benefits quickly.[20] The employer, on

[19] As a general rule, all states requires such a credit so that a supplemented award does not result in double liability for the employer. See generally 4 A. Larson, *The Law of Workmen's Compensation* § 85.70 (1978); *Restatement (Second) of Conflict of Laws* § 182, Comment *b* (1971).

[20] In this case, for example, petitioner entered into an agreement with the respondent under Virginia law within two weeks of the accident and while he was still hospitalized. In relating these facts, we do not intend to suggest that this agreement was the result of any impropriety by respondent.

the other hand, will generally be aware of the relative advantages and disadvantages of the various statutes potentially involved and may be motivated to steer the employee toward an award in a less favorable jurisdiction. See 4 A. Larson, *The Law of Workmen's Compensation* § 85.60 (1978).

The undeniable result of the court of appeals' rule is that an employee's recovery will often be limited to the amount available under the least generous of the applicable statutes. The result of a contrary rule permitting successive awards will generally be that an employee will recover the benefits due under the most generous applicable compensation laws. This result is not unfair to the employer because his liability, as long as the first award is credited against the second, is no greater than it would have been had a well-informed employee chosen the proper jurisdiction in the first place. In view of the strong policy in favor of compensation of injured employees, the latter result is clearly appropriate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 309246 206

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-116

HALLEY I. THOMAS,
Petitioner

v.

WASHINGTON GAS LIGHT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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February 21, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-116

HALLEY I. THOMAS,
Petitioner

v.

WASHINGTON GAS LIGHT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR WASHINGTON GAS LIGHT COMPANY

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are set forth in the appendix to this brief: U.S. Const., Art. IV, § 1; 28 U.S.C. §§ 1738-39; 33 U.S.C. §§ 913(a), 930(f); Act of March 4, 1927, ch. 509, § 3(a), 44 Stat. 1426; D.C. Code § 36-501 (1973); and Va. Code §§ 65.1-40, -54, -61, -93, -100, -103, and -104 (1968), as amended by 1970 Va. Acts, ch. 470.

QUESTIONS PRESENTED *

(1) Petitioner filed for workmen's compensation in the District of Columbia more than three and one-half years after the injury under a District of Columbia statute which has a general requirement that claims be filed in one year.

Was not Petitioner's claim filed too late?

(2) In 1971, when Petitioner was injured and awarded compensation in Virginia, District of Columbia law provided that workmen's compensation was not available in the District of Columbia if workmen's compensation could validly be provided by state law.

Was the District of Columbia statute available to Petitioner for the same injury?

(3) On March 15, 1971, Petitioner was granted a workmen's compensation award in Virginia that afforded all the benefits available under Virginia law and was enforceable in Virginia as a final award.

Is not that Virginia workmen's compensation award final for purposes of the Full Faith and Credit Clause?

(4) On September 24, 1974, Petitioner sought a second workmen's compensation award in the District of Columbia based on the same incident in Virginia.

Is not the Virginia award entitled to full faith and credit in the District of Columbia?

(5) 28 U.S.C. §§ 1738 and 1739 legislatively implement Article IV, Section 1, of the Constitution, which mandates that the legislative acts, the records and judicial

* The Court of Appeals did not consider Questions 1 and 2. They are argued as alternative grounds on which the judgment can be affirmed. See, *e.g.*, *Massachusetts Mut. Ins. Co.* v. *Ludwig*, 426 U.S. 479 (1976).

proceedings of any court, and nonjudicial records of any state shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

Is not a workmen's compensation award included within these provisions?

COUNTERSTATEMENT OF THE CASE

This case involves the lawfulness of an award under the workmen's compensation statute for the District of Columbia to an employee who had previously received an award for the same injury under the Virginia workmen's compensation statute.

Mr. Halley I. Thomas, a resident of the District of Columbia, began working for Washington Gas Light Company (WGL) in January 1970 (Appendix (App.) 36a).[1] Thomas injured his back while operating a jackhammer in Arlington, Virginia, on January 22, 1971 (App. 35a, 37a).[2]

WGL, a self-insured employer for purpose of workmen's compensation, moved promptly to provide Thomas with compensation under the workmen's compensation law of Virginia[3]—the location of the office out of which Thomas was working and the jurisdiction where the

[1] WGL is incorporated both in Virginia and in the District of Columbia. It engages in the purchase, distribution, and sale of natural gas at retail in the Washington metropolitan area, which includes the District of Columbia and adjoining areas of Virginia and Maryland, and it has employees working in all three jurisdictions.

[2] The date of injury is significant.

[3] Va. Code § 65.1-1 *et seq.* (1968), as amended by 1970 Va. Acts, ch. 470. In citing the Virginia Workmen's Compensation Act, we will cite the version in effect at the time of Thomas' injury. Subsequent amendments will be noted.

injury occurred (App. 37a). On February 5, 1971, Thomas and WGL executed a "memorandum of agreement as to payment of compensation" on a form provided by the Industrial Commission of Virginia. Under this agreement, Thomas has received $62 per week, payable from January 30, 1971, "until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia" (App. 53a).

As required by Va. Code § 65.1-93 (1968), the agreement was submitted to the Industrial Commission for consideration. It was approved and an award was granted on March 15, 1971. The award stated that "in accordance with the provisions of" the Virginia Workmen's Compensation Act, the Commission was entering an award "as follows: $62.00 per week, during incapacity, payable weekly, beginning January 30, 1971. Medical benefits are awarded for the full statutory period" (App. 54a). WGL honored the award.

Thomas has never claimed that he was induced to seek an award of compensation in Virginia, rather than in the District of Columbia, by mistake, ignorance, fraud, or coercion. As a result, there is no evidence to support any charge of wrongdoing by WGL that might be lurking in the statement in Thomas' brief that "the employer seized on the fortuity of the injury occurring in Virginia and directed its employee to that forum to seek compensation" (Pet. Br. 22). Indeed, as will be developed below, there is an argument, which WGL believes to be persuasive, that, because Thomas could receive an award from Virginia, he was ineligible to receive compensation under the District of Columbia statute.

It was not until September 24, 1974—more than three and one-half years after the injury occurred and more than one year after Thomas retained counsel (App. 30a)—that Thomas filed a claim seeking compensation

for the same injury under the workmen's compensation statute of the District of Columbia. That statute, D.C. Code §§ 36-501 *et seq.* (1973), incorporates by reference the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*[4] The District of Columbia's workmen's compensation program is administered by the Office of Workers' Compensation Programs of the U.S. Department of Labor.

A hearing was held before an administrative law judge on August 7, 1975. At the time of the hearing, Thomas was receiving compensation pursuant to the Virginia award. In addition, he was (and apparently still is) receiving disability payments under the Social Security Act (App. 38a).

On September 24, 1975, the administrative law judge filed an interlocutory decision and order rejecting WGL's contention that the Full Faith and Credit Clause of the U.S. Constitution precluded the District of Columbia from granting an award following Virginia's granting an award for the same injury (App. 34a). On March 4, 1976, a decision and order issued that found WGL liable to pay Thomas compensation for permanent total disability (App. 20a, 31a). Thomas' claim was found to be timely and, in addition, WGL was found liable to pay a 10 percent penalty on each installment which had been found to be due, but not paid within 14 days after it became due (App. 31a).[5]

Both WGL and Thomas sought review by the Labor Department's Benefits Review Board (see 33 U.S.C.

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[4] Unless otherwise indicated, citations to the United States Code are to the 1976 edition.

[5] WGL was also ordered to pay six percent interest on any overdue installment and to pay Thomas' attorney $1860 for his services (App. 31a-32a). It was held that WGL could deduct the amounts it had paid under the Virginia award from any compensation due under the District of Columbia award (App. 31a).

§ 921(b)). On October 20, 1976, that Board said that an unsatisfactory record precluded it from determining the timeliness of the claim (App. 16a-18a). After a hearing on remand, a supplemental decision held that Thomas' claim was timely and a 10 percent penalty was again imposed (App. 9a).

Upon WGL's second appeal, the Benefits Review Board affirmed the administrative judge's order on February 28, 1978 (App. 3a). In reliance on its own decision in *Pettus* v. *American Airlines, Inc.*, 6 B.R.B.S. 461, the Board ruled that the earlier Virginia award did not preclude a District of Columbia award (App. 6a).

The Board also ruled that Thomas' claim was timely even though it had not been filed within one year of injury as required by 33 U.S.C. § 913(a). The Board said that this statute of limitations had been tolled by 33 U.S.C. § 930(f), because WGL had not filed certain injury reports with the Department of Labor. WGL's argument that its filing of similar reports with Virginia constituted compliance was rejected (App. 6a).

The Board also upheld the imposition of a 10 percent penalty for failing to make compensation payments when due. The Board stated that 33 U.S.C. § 914(e) provided only limited grounds for excusing the penalty, and that WGL's payment of compensation pursuant to Virginia law was not one of them (App. 7a). Finally, the Board held that, on appeal, WGL could not raise Thomas' failure to provide the Department of Labor and the employer with notice of a compensable injury within 30 days of the injury as required by 33 U.S.C. § 912(a), when that issue had not been raised at the hearing (App. 8a).

As authorized by 33 U.S.C. § 921(c), WGL sought review in the United States Court of Appeals for the Fourth Circuit, the circuit in which the injury occurred.

The employer in *Pettus* v. *American Airlines, Inc.*, 6 B.R.B.S. 461, the case on which the Board had relied in denying WGL's Full Faith and Credit Clause contention, had also sought review in that court. On September 26, 1978, the Fourth Circuit issued an opinion in *Pettus* vacating the award under the District of Columbia statute (*Pettus* v. *American Airlines, Inc.*, 587 F.2d 627, *cert. denied*, 48 U.S.L.W. 3222 (Oct. 1, 1979) (No. 78-1739)). The court held that res judicata and the Full Faith and Credit Clause of the Constitution required that an earlier termination of claimant's award by the Virginia Industrial Commission be honored by the Benefits Review Board.

WGL thereupon moved for summary reversal, which the Court of Appeals granted, noting that the case was controlled by *Pettus* (App. 1a-2a). This Court's grant of certiorari followed.

SUMMARY OF ARGUMENT

I

There are two statutory grounds for denying Thomas' claim for compensation under the District of Columbia workmen's compensation law, which incorporates by reference the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). (The Court of Appeals did not reach these questions because of its reliance on an earlier decision dealing with the Full Faith and Credit Clause issue.)

The first ground is that Thomas' claim was untimely made in that it was filed long after the LHWCA's one-year statute of limitations (33 U.S.C. § 913(a)) had expired. The Benefits Review Board held that this statute of limitations was tolled under 33 U.S.C. § 930(f), because WGL had not filed certain injury reports with the Department of Labor. But the tolling provision has

no application where an employer has submitted injury reports to an appropriate state agency and has paid compensation to the employee under a state workmen's compensation act. The tolling provision was added to the LHWCA in 1938, when it was thought that the LHWCA and state workmen's compensation laws were mutually exclusive. Consequently, the purpose of the tolling provision was to ensure that employees who could not receive state workmen's compensation would not be deprived of their right to receive compensation under the LHWCA by their employers' failure to file required reports. This purpose does not apply when the employee has already received compensation under a state workmen's compensation statute.

The Benefits Review Board's construction of the tolling provision not only goes beyond Congress' purpose in enacting it, but also leads to unjust results. Under the Board's view, the statute of limitations would be forever tolled so long as the employer had not physically filed reports with the Department of Labor. This construction of the statute leads to the revival of an untold number of claims that were settled years ago.

The second ground is that at the time Thomas was injured the LHWCA expressly forbade the granting of an award where compensation from a state workmen's compensation program could be validly had. A construction that effectuates this plain language creates no irreconcilable conflicts between the District of Columbia statute and the LHWCA, and is consistent with Congress' purpose in enacting the District of Columbia statute, which was to provide a compensation program for employees who currently had none. Since Thomas could—and did—receive compensation under Virginia's Workmen's Compensation Act, he is ineligible under the District of Columbia Act.

II

With regard to the issue arising under the Full Faith and Credit Clause, the Court of Appeals correctly held that *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943)—not *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947)—governs this case. In *Magnolia*, a Louisiana resident who was injured in Texas secured an award under the Texas workmen's compensation law, which under Texas law barred further relief. He then secured an award under the Louisiana workmen's compensation act. This Court held that the Louisiana award was barred by the Full Faith and Credit Clause, because Louisiana had to give the Texas award the same preclusive effect that it had in Texas. The Court held that a workmen's compensation claimant who secures an award that is final in the granting state is no different from a plaintiff in a tort or contract action who secures a judgment.

In *McCartin*, on the other hand, the employer and employee had inserted into a lump sum settlement agreement under the Illinois workmen's compensation statute a provision stating that an Illinois award would not affect the employee's right to seek an award in Wisconsin, and this agreement was incorporated into the award of the Illinois Industrial Commission. This Court, distinguishing *Magnolia*, held that the Full Faith and Credit Clause did not bar the Wisconsin award. The Court found nothing in the Illinois statute to preclude such an award, and found that the agreement allowing the Wisconsin claim to be prosecuted was of "decisive" significance (330 U.S. at 630).

The key question here is *not* whether Virginia intended to bar the District of Columbia from granting a successive award. The requirement that one examine whether the first state intended to preclude further awards elsewhere has its source in a statement in *McCartin*. But

by this statement, *McCartin*, in dictum, departed from the Full Faith and Credit Clause, the enabling statute, and this Court's prior decisions. They require that the effect that an award or judgment has *in the state that issued it* be given elsewhere. On its unique facts, *McCartin* was not wrongly decided, because there the employer had through the agreement waived any res judicata defense he might have in Wisconsin. But the erroneous dictum in *McCartin* should not be followed here. The District of Columbia must give the Virginia award the same effect that it has in Virginia.

The Virginia award was final under Virginia law. First, no significance attaches under Virginia law to the fact that Thomas' award was pursuant to a voluntary agreement rather than a contested award. Once an agreement is approved by the Virginia Industrial Commission—as the agreement between Thomas and WGL was—it has the identical effect as an award following a contest. Second, the claim that Thomas' Virginia award should not bar a District of Columbia award, because the Virginia award was for "temporary" disability and the District of Columbia award was for "permanent" disability must fail. The distinction between "permanent" and "temporary" total disability did not exist under Virginia law. Thomas received an award under a provision granting compensation for "total incapacity," and he was paid the maximum under Virginia law.

Even if one were to follow the language of *McCartin*, the Court of Appeals had an ample basis for construing Virginia law to bar successive awards for the same injury in other jurisdictions. The plain language of the Virginia Workmen's Compensation Act, which is fully supported by the decisions, makes it clear that that Act is intended to be the employee's exclusive remedy against his employer.

Finally, claims under the Virginia and District of Columbia workmen's compensation statutes do not constitute separate causes of action. *Magnolia* rejected this argument, and there is no reason to reach any different result here.

As an initial matter, while the Virginia Industrial Commission determines claims only under Virginia law, there is no constitutional reason why it could not, in appropriate cases, determine claims under District of Columbia law. In effect, Virginia has by statute determined the choice of governing law for the Virginia Industrial Commission.

A plaintiff who brings a wrongful death action in a state that applies a statute with a limit on damages cannot later bring a successful suit in another jurisdiction that will apply a wrongful death statute without a limitation. Full faith and credit bars the second suit. Thomas is no different from such a plaintiff, and attempts to distinguish a claimant for workmen's compensation from a plaintiff in tort and contract actions are not persuasive.

Certainly, policy interests do not justify such a distinction. It is doubtful at best to claim that a jurisdiction has a greater interest in seeing that workers get compensation than it has in seeing that persons injured by tort or breach of contract get full relief. In any event, this Court has found the Full Faith and Credit Clause to outweigh policy interests at least as substantial as those of a jurisdiction in granting workmen's compensation.

Nor does the opportunity that a plaintiff in a tort or contract action has to litigate choice of law issues furnish a basis for distinguishing workmen's compensation, either when viewed from the standpoint of interested states or from the standpoint of the litigants. With regard to the former, a forum state is not constitutionally com-

pelled to consider the interests of other states in choosing the governing law; it may apply its own law so long as its interests in a case do not fall below a constitutional minimum. As to the interests of the litigants, if any plaintiff ought to be able to relitigate a claim, it should be one who litigates and loses a choice of law question. Such a plaintiff might have reasonably thought that the first forum would apply a more favorable law than it in fact did. In contrast, a claimant for workmen's compensation can have no doubt as to what law an industrial commission will apply.

Finally, the suggestion that employers might "overreach" and seek to have employees agree to compensation in the least generous forum furnishes no basis to except workmen's compensation from the general rule on full faith and credit. The state that issues an award is fully capable of dealing with any employer overreaching. For instance, Virginia allows seasonably made petitions to vacate awards on the ground of fraud, imposition, or mistake. This Court long ago refused to carve out an exception under the Full Faith and Credit Clause for allegations that a judgment had been secured by fraud, and there is no reason to do so here.

ARGUMENT

I

UNDER DISTRICT OF COLUMBIA LAW, THOMAS IS NOT ENTITLED TO AN AWARD UNDER THE DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT.

On two separate statutory grounds, Thomas' claim for compensation should have been denied: (1) Thomas' claim for compensation under District of Columbia law was untimely made; and (2) under the District of Columbia's statute as it existed at the time Thomas was injured, the grant of a prior Virginia award barred a District of Columbia award.

Having already decided the Full Faith and Credit Clause issue in *Pettus* v. *American Airlines, Inc., supra* (587 F.2d 627), the Court of Appeals did not pass on these statutory grounds in setting aside Thomas' award of compensation. It is settled, however, that a respondent is expected "to urge any grounds which would lend support to the judgment below . . ." (*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 at 419 (1977)). Because these two statutory barriers do not raise constitutional issues, they should be considered first. See, *e.g.*, *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979).

A. Thomas Filed His Claim Too Late.

The District of Columbia workmen's compensation law incorporates by reference the Longshoremen's and Harbor Workers' Compensation Act (LHWCA),[6] and the LHWCA

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[6] D.C. Code § 36-501 provides:

"The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an em-

generally requires that an award of compensation under it "shall be barred unless a claim therefore is filed within one year after the injury or death" (33 U.S.C. § 913(a)).[7] Here, Thomas' claim was filed two and one-half years after the one-year deadline had passed, but the Benefits Review Board still overruled WGL's contention that the claim was untimely made.[8] Notwithstanding the lapse of

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ployer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person."

[7] In full, Section 913(a) provides:

"(a) Except as otherwise provided in this section, *the right* to compensation for disability or death *under this chapter shall be barred* unless a claim therefore *is filed within one year after the injury or death.* If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." (Emphasis added.)

The payment of compensation by WGL under the Virginia Workmen's Compensation Act cannot be considered "payment of compensation," which under this provision would toll the one year statute of limitations. "Compensation" is defined by the LHWCA as payment under that Act, not payment pursuant to an award under a state workmen's compensation act. 33 U.S.C. § 902(12). See *Marshall* v. *Pletz*, 317 U.S. 383 at 390-91 (1943); *Windrem* v. *Bethlehem Steel Corp.*, 293 F.Supp. 1 (D.N.J. 1968). But see *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F.2d 265 (N.D. Ill. 1930).

[8] Of course, statutes of limitation are based on sound policy: "The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court . . . as a meritorious defense, in itself serving a public interest" (*Guaranty Trust Co.* v. *United States*, 304 U.S. 126 at 136 (1938)).

time, the Board held that the statute of limitations was tolled by 33 U.S.C. § 930(f), under which the time limit of 33 U.S.C. § 913 "shall not begin to run against the claim of the injured employee . . ." until the employer shall have filed certain injury reports with the Department of Labor.[9] The Benefits Review Board found that Thomas' claim was not untimely on the ground that WGL had not physically filed these reports with the Department of Labor, even though WGL had filed similar reports with the Virginia Industrial Commission and had paid compensation under Virginia law (App. 6a-7a).

Here, "the basic inquiry is whether congressional purpose is effectuated by tolling the statute in given circumstances." *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424 at 427 (1965). The tolling provision of 33 U.S.C. § 930(f) was added to the LHWCA in 1938 (Act of June 25, 1938, ch. 685, § 11, 52 Stat. 1167). The reason given in the committee reports was that, in some instances, employees had been untimely in filing claims for compensation, because the employer had not filed the injury reports required by 33 U.S.C. § 930. "The purpose of this amendment is to remove any possible motive to withhold such reports of injury by making the bar of the limitation upon the right to file a claim begin to run only after such report of injury has been filed . . ." (H.R. Rep. No. 1945, 75th Cong., 3d Sess., at 9 (1938), quoted in S.Rep. No. 1988, 75th Cong., 3d Sess., at 9 (1938)).

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[9] 33 U.S.C. § 930(f) states:

"(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section."

It will be recalled, that in implementing this congressional purpose, Congress enacted this provision at a time when it was thought that the LHWCA and state workmen's compensation laws were mutually exclusive (see generally Gilmore & Black, *The Law of Admiralty* § 6-49 (2d ed. 1975)). Consequently, the congressional purpose behind 33 U.S.C. § 930(f) was to ensure that an employee receive compensation under the LHWCA in a situation where state workmen's compensation was not considered to be available.[10] This purpose does not apply when, as here, the employee received an award under a state workmen's compensation statute, and there is no reason to extend the tolling provision of 33 U.S.C. § 930 (f) to such a case.

The Benefit Review Board's interpretation of the statute is completely mechanistic, and easily lends itself to unjust results. The Board would find the statute of limitations to be forever tolled so long as the employer had not physically filed injury reports with the Department of Labor. This would be in spite of the fact that an employer had settled an employee's claim under another statute or that the employee had long and unreasonably delayed in filing his claim under the District of Columbia law. Under the Board's view, not only would such a claim be timely, but the employer would in addition be automatically liable for the 10 percent penalty imposed by 33 U.S.C. § 914(e). Thomas himself waited 45 months after his injury and 15 months after retaining counsel (App. 30a) before filing. On these facts, the Board's decision is arbitrary and at odds with any reasonable view of Congress' purpose in enacting the tolling provision.

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[10] In reaching a contrary result, the District of Columbia Circuit ignored this purpose in *Director* v. *National Van Lines, Inc.*, —— F.2d —— (No. 78-1259; D.C. Cir., Nov. 13, 1979).

B. When Thomas Was Injured in 1971, the District of Columbia Law Did Not Allow Compensation in the District of Columbia When Workmen's Compensation Was Available in a State.

At the time Thomas was injured in 1971, Section 3(a) of the LHWCA provided that compensation was payable only if (1) the injury occurred upon navigable waters and (2) if a recovery for the injury could not be had under state workmen's compensation laws:[11]

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law*" (Act of March 4, 1927, ch. 509, § 3(a), 44 Stat. 1426 (codified at 33 U.S.C. § 903(a) (1970)) (emphasis added)).

The plain language of this law provided that no recovery could be had in the District of Columbia if recovery could be "validly" had under a state's workmen's compensation program. Thomas has had a recovery under the Virginia Workmen's Compensation Act, and there is no reason to doubt the validity of that recovery. Since Thomas could, and did, receive an award from Virginia, he cannot receive an award under the District of Columbia law.

This is consistent with this Court's interpretation of the LHWCA. Whatever may have been the case for em-

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[11] This provision was substantially amended by the LHWCA Amendments of 1972, but the Amendments did not take effect until November 1972, long after Thomas' injury (Act of Oct. 27, 1972, Pub. L. No. 92-576, § 22, 86 Stat. 1265).

ployees injured on navigable waters,[12] compensation was not given under the LHWCA to employees who had suffered, as Thomas did, "injuries on land traditionally within the ambit of state compensation acts." *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 at 221 (1969). Thomas was not injured on the water.

Moreover, the very purpose of Congress in adopting the District of Columbia workmen's compensation statute, was to provide compensation to employees who then had no compensation law:

> "Congress has long neglected the private employees in the District of Columbia. *They have no accident compensation law, no employers' liability statute. . . .*"
>
> * * * * *
>
> "The bill (S. 3565) would now extend the reasonable compensation protection of the Federal law of 1927 [the LHWCA] to other private employments in the District of Columbia" (S.Rep. No. 852, 70th Cong., 1st Sess., at 1-2 (1928) (emphasis added)).

Employees already eligible for compensation under state workmen's compensation laws had no need for this protection; they had not been "neglected." Furthermore, the "reasonable compensation protection" of the LHWCA was subject to the express condition that compensation under a state program not be available. There is no reason to believe that Congress did not intend to have this express condition apply to the District of Columbia law as well as to the LHWCA.[13]

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[12] See *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). See also *Shea* v. *Texas Employers' Ins. Ass'n*, 383 F.2d 16 (5th Cir. 1967) (holding that employee who had received state award cannot receive award under LHWCA).

[13] It was certainly reasonable for Congress in enacting the District of Columbia law to defer to existing state compensation programs, where available. For instance, in this particular case the difference in weekly payments to Thomas was small: $62 in Virginia versus $70 in the District of Columbia. See Va. Code § 65.1-54 (1968), as amended by 1970 Va. Acts, ch. 470; Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203 (codified at 33 U.S.C. § 906(b) (1970)). Virginia does, however, place a ceiling on payments for injuries such as that to Thomas' back ($24,800 or 500 weeks (Va. Code § 65.1-54, *supra*)). These differences are not of sufficient magnitude to make Congress' deference to Virginia's program irrational.

On this issue, *Travelers Ins. Co.* v. *Cardillo*, 141 F.2d 362 (D.C. Cir. 1944), which the Department of Labor cites in its brief as the "Federal Respondent" (DOL Br. 24 n.16), is wrong.[14] There, it was contended that an employee who could have been compensated in Maryland was not eligible for a District of Columbia award. The court said that it was "obvious" that Section 3(a) of the LHWCA has "no proper place in the District Act" and suggested that "the failure of Congress to expressly exclude it was perhaps due to inadvertence . . ." (141 F.2d at 364). The court held that the District of Columbia law "shows unmistakably the precise extent and the precise limitations of its jurisdiction and coverage, and these must be given effect, or else the whole purpose of the Act would be lost . . ." (*ibid.*). Of the conditions contained in Section 3(a) of the LHWCA that an injury occur on navigable waters and not be compensable under a state law, the court said (141 F.2d at 364):

> "To apply the limitations of the Section to the District of Columbia Act would destroy it, make it wholly inoperative and result in an absurdity. For

[14] WGL welcomes the participation here of the Department of Labor as an *amicus curiae*, but not as a party. Under the prevailing Fourth Circuit rule, the Department and its officers are not parties to actions seeking review of Benefits Review Board decisions (*ITO Corp.* v. *Benefits Review Board*, 542 F.2d 903 at 906-07 (4th Cir. en banc 1976)), and the Department did not participate in the proceedings below in the Court of Appeals. Accordingly, the Department of Labor is not a party under the terms of Rule 21(4), Supreme Court Rules.

> as to the navigable waters it would be a meaningless duplication, and as to the exclusion of injuries compensable under State laws, it would be in the teeth of the language of the local law extending its provisions to cases of injury or death, irrespective of the place where either occurred."

The requirement in Section 3(a) that an injury occur on navigable waters could not be applicable to the District of Columbia Act. Otherwise, the law would be a "meaningless duplication" of the LHWCA. As to this requirement, there was an irreconcilable conflict between the two statutes.

But there is no such conflict with regard to the requirement that an injury not be compensable under a state workmen's compensation law. Repeals by implication are not favored, and provisions in statutes should be harmonized where possible. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535 (1974). Here, the requirement in Section 3(a) regarding right of recovery under state law can be harmonized with the District of Columbia statute by simply understanding that Congress intended to allow recovery under the District of Columbia statute to employees of District of Columbia employers when recovery was not available under a state workmen's compensation law. This analysis is entirely consistent with the congressional desire, as expressed in the Senate report quoted above, to make compensation benefits available to employees who then had no protection.[15]

The very words of the statute show that Congress quite reasonably intended to provide compensation when injury occurred *outside* the District of Columbia, only when compensation was not available under the workmen's

[15] In at least one other instance, Congress has stated a desire to defer to state workmen's compensation laws. 42 U.S.C. § 1705, dealing with compensation for war hazards, states that no benefits under 42 U.S.C. § 1701 *et seq.* shall be granted if compensation for the same injury was granted under state law. See also note 31 *infra*.

compensation law of the jurisdiction where the injury occurred. So interpreted, there is no inconsistency between Section 3(a) of the LHWCA as it existed at the time Thomas was injured and the District of Columbia workmen's compensation law.

Accordingly, Thomas' award under the District of Columbia law should be set aside on the ground that his injury was compensable under Virginia law.[16]

II

THE FULL FAITH AND CREDIT CLAUSE MANDATES THAT A WORKMEN'S COMPENSATION AWARD WHICH IS FINAL IN VIRGINIA BE GIVEN THE SAME EFFECT IN THE DISTRICT OF COLUMBIA AS IT HAS IN VIRGINIA.

Our Constitution is explicit:

> "Full Faith and Credit shall be given in each State to the public acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof" (Article IV, Section 1).

The First Congress enacted a statute implementing this provision in 1790.[17] In its current form that statute provides that the "Acts of the legislature" and the "records and judicial proceedings of any court" of any state that are authenticated according to the statute "shall have the same full faith and credit in every court within the

[16] A ruling on the ground that Thomas was not entitled to a District of Columbia award would not affect prior final decisions granting awards, even though the employees in those cases might have been eligible for an award under a state law. 33 U.S.C. § 922 does not allow awards to be modified on the ground of mistake of law. See *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 at 256 (1971).

[17] Act of May 26, 1790, ch. 11, 1 Stat. 122.

United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken" (28 U.S.C. § 1738). Similar treatment is accorded the "nonjudicial records or books kept in any public office of any State, Territory, or Possession . . ." (28 U.S.C. § 1739).[18]

Problems under the Full Faith and Credit Clause usually arise in two contexts, the first involving choice of laws—whether a forum state must apply the law of a sister state—and the second involving the effect of judgments from sister states. With regard to choice of law, "[t]he Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state." *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 at 516 (1953). The instant case does not involve a problem of choice of law.

Instead, this case involves the effect of a judgment, and when a forum state is asked to give effect to the judgment entered by the court of another state, the guiding rule, as stated over 160 years ago by Chief Justice Marshall, is that the forum state has no choice: "[T]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and . . . whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." *Hampton* v. *McConnel*, 16 U.S. (3 Wheat.) 234 at 235 (1818). The continuing validity of this rule was noted in *Williams* v. *North Caro-*

[18] 28 U.S.C. §§ 1738 and 1739 are set forth *infra* in the appendix. The statutory reference to "every court" applies to federal courts —such as the Court of Appeals in this case—as well as to state courts. *Davis* v. *Davis*, 305 U.S. 32 (1938); *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481 (1813).

lina, 317 U.S. 287 at 294-95 (1942), and just last Term, the Court summarized the matter as follows: "A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." *Nevada* v. *Hall*, 440 U.S. 410 at 421 (1979).

Here, the question is whether the award granting workmen's compensation to Thomas in Virginia in 1971 is to be an exception to the rule on judgments. The decision of this Court most closely on point is *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943).

Hunt, a resident of Louisiana, was hired in Louisiana to work in the drilling of oil wells. During the course of employment he worked in Texas and was injured there. Under Texas law a workmen's compensation award constituted an employee's sole remedy, which, when final, was the equivalent of a court's judgment. Thus, an employee could not get a second award for the same injury, nor could he get an award from Texas if he had previously obtained an award from another state (320 U.S. at 435). Hunt secured an award under the Texas statute and then in Louisiana recovered compensation for the same injury under the Louisiana workmen's compensation law (320 U.S. at 433-34). This Court set aside the Louisiana award.[19]

The Court reasoned that, while a state is generally free to apply its own workmen's compensation law, the issue was not choice of law, but the effect of the Texas award under the Full Faith and Credit Clause. The Court pointed out that the Constitution makes "that which has been adjudicated in one state res judicata to the same extent in every other" (320 U.S. at 438), with the result that Louisiana is "deprived . . . of the power to deny that

[19] Note that the amounts awarded Hunt under the Texas law were deducted from the Louisiana award (320 U.S. at 434). This did not influence the result reached by the Court.

the Texas award has the same binding effect on the parties in Louisiana as it has in Texas" (320 U.S. at 440).

The Court said that any Louisiana policy interest in granting an award was overridden by the policy underlying the Full Faith and Credit Clause (320 U.S. at 440-41), and that it was not sufficient to say that the Louisiana claim was a separate cause of action because it arose under a different statute: "The grounds of recovery are the same in one state as in the other—the injury to the employee in the course of his employment. The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time" (320 U.S. at 444). In this regard, it made absolutely no difference that Louisiana authorized a higher recovery: "A judgment in tort or in contract is not immune from the requirement of full faith and credit because the successful plaintiff could have maintained his suit under the law of other states and have secured a larger recovery . . ." (320 U.S. at 445). The Court ruled that workmen's compensation awards did not stand on any different footing from other state judgments (320 U.S. at 446).[20]

[20] The Court disposed of the need for further semantic discussion (320 U.S. at 443):

> "Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a 'judicial proceeding,' or its award is a 'record' within the meaning of the full faith credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have 'such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.'"

This statement is still true under the current version of the implementing statute (28 U.S.C. §§ 1738-39). Accordingly, the Court need not decide whether the approval of the compensation agreement by the Virginia Industrial Commission constitutes a "judicial proceeding" or a "nonjudicial record . . . kept in any public office." The Constitution requires that each be entitled to full faith and credit.

In spite of the clear teachings of *Magnolia*, Thomas tries to rely on *McCartin*, decided in 1947.[21] The facts of that case are peculiar, perhaps unique. Both the employer and the employee were Illinois residents. The employee was injured on a building job in Wisconsin (330 U.S. at 623). He first filed in Wisconsin for a workmen's compensation award, but the employer and his insurance carrier objected to Wisconsin's jurisdiction. Consequently, the employee also filed a claim in Illinois. The Wisconsin Commission told the parties that the employee was free under Wisconsin law to prosecute the Illinois claim and then prosecute the Wisconsin claim, upon the understanding that any Illinois award would be credited against any Wisconsin award (330 U.S. at 624).

The parties next settled the Illinois claim with a lump sum agreement that expressly did "not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin." The Illinois Industrial Commission, following a hearing, approved the agreement, which "became 'in legal effect an award.'" (330 U.S. at 624-25, 628.)

The Wisconsin Industrial Commission then gave the employee a successive award. In reliance on the then recently decided *Magnolia* case, the Wisconsin Supreme Court set aside the Wisconsin award. This Court reversed.

Magnolia was distinguished on the ground that the Illinois award in *McCartin* was "different in its nature and effect from the Texas award in the *Magnolia* case" (330 U.S. at 627). Having distinguished *Magnolia*, the Court said: "[T]here is nothing in the [Illinois] statute

[21] *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947). Thomas and the Department of Labor emphasize that *McCartin* was unanimously decided, but this is how it should have been. While *Magnolia* involved a novel question of law, *McCartin* was needed to correct an obvious misapplication of *Magnolia* by the Wisconsin Supreme Court.

or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment" (330 U.S. at 627-28). The Court pointedly added: "We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen's Compensation Act . . ." because *the award itself reserved the right* to prosecute the Wisconsin claim (330 U.S. at 628).

The contract between the parties had become "part of the Illinois award, an award which has achieved finality in the absence of a timely appeal." When the contractual reservation is read against the Illinois statute, "it becomes clear that the reservation spells out what we believe to be implicit in that Act—namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state. And in the setting of this case, *that fact is of decisive significance*" (330 U.S. at 630) (emphasis added).

A. *McCartin* Does Not Alter the Mandate of the Constitution.

Thomas contends that the key question is whether Virginia intended to preclude the granting of a further award by the District of Columbia (Pet. Br. 11-17; see also DOL Br. 11-22). He relies on the passage in *McCartin* where the Court said (330 U.S. at 627-28):

> "[T]here is nothing in the [Illinois] statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state received there in the course of an Illinois employment. . . . Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction."

This reliance on *McCartin* is misplaced.

As legislatively implemented by 28 U.S.C. §§ 1738-39, the Constitution requires that judicial proceedings and public records "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Accordingly, the relevant question is what is the effect of a judgment or award in the state that entered it, because every other court in the United States must give it that effect. As Chief Justice Marshall put it, "[T]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced . . . ." *Hampton* v. *McConnel*, *supra*, 16 U.S. (3 Wheat.) at 235. The correctness of this view has been reaffirmed by numerous decisions over the years. See, *e.g.*, *Durfee* v. *Duke*, 375 U.S. 106 at 109 (1963); *Williams* v. *North Carolina*, 317 U.S. 287 at 294-95 (1942); *Fauntleroy* v. *Lum*, 210 U.S. 230 at 236-37 (1908).

Hence, the relevant issue in *McCartin* was not whether Illinois intended to preclude a further award in Wisconsin. Rather, it was whether the Illinois award precluded a further award in Illinois. And the Court had previously recognized this to be the issue in *Magnolia* when it stated (320 U.S. at 440):

> "But whether the Texas award purported also to adjudicate the rights and duties of the parties under the Louisiana law or to control persons and courts in Louisiana is irrelevant to our present inquiry. For Texas is without power to give extraterritorial effect to its laws. [Citations omitted.] The significant question in this case is whether the full faith and credit clause has deprived Louisiana of the power to deny that *the Texas award has the same binding effect on the parties in Louisiana as it has in Texas.*" (Emphasis added.)

This is not to say that *McCartin* was wrongly decided on its peculiar, indeed unique, facts. It will be recalled that the employer had signed an agreement in Illinois which expressly provided that the Illinois settlement did not affect the employee's rights to file in Wisconsin. In view of this fact, which *McCartin* itself considered "decisive" (330 U.S. at 630), the result in *McCartin* can only be based on the ground the employer had waived any res judicata defenses he might have had in Wisconsin. As the Fourth Circuit put it in *Pettus*, "prosecution of the proceeding in Wisconsin was virtually under stipulations of consent" (587 F.2d at 631).

Consequently, the statement in *McCartin* that one should examine a state's statutes and decisions to determine whether an award is designed to preclude awards in other jurisdictions should be regarded as dictum, thus unnecessary to the decision there. Since that dictum is contrary to 28 U.S.C. §§ 1738-39 and this Court's prior decisions, it should not govern the outcome here.

Instead, the Court should focus directly on the effect that Thomas' Virginia award has in Virginia. As we next show, that award is *final* under Virginia law and sets the maximum recovery that can be had in Virginia. The Virginia award is entitled to be given the same effect in the District of Columbia as it has in Virginia.

B. Under Virginia Law the Award to Thomas Was Final.

1. A Settlement Agreement Approved by the Virginia Industrial Commission Is the Equivalent of a Contested Award.

Thomas argues that the Virginia agreement to provide compensation should not be given res judicata effect because it was an agreement approved by the Virginia Industrial Commission rather than an award following a contest (Pet. Br. 20). He vainly relies on *Carroll* v.

Lanza, 349 U.S. 408 at 410-11 (1955), wherein the employer had simply begun making compensation payments under the laws of the first state, Missouri, without waiting for an award.

Thomas ignores a crucial distinction. There is no indication in *Carroll* that any state agency in Missouri had made any determination as to the employee's right to receive compensation payments. There was, therefore, no record or judicial proceeding entitled to full faith and credit.[22] By contrast, the Virginia Industrial Commission approved the agreement between Thomas and WGL, and an approved agreement has, under Virginia law, all the effect of an award granted by the Commission following a contest.

Under Virginia law, all agreements between an employer and employee with respect to workmen's compensation must be submitted to the Industrial Commission for its approval (Va. Code § 65.1-93 (1968)).[23] Contrary to

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[22] The issue in *Carroll* was whether Arkansas had to apply the Missouri workmen's compensation statute or could apply its own laws. In accord with other cases giving forum states freedom in choice of law questions, the Court held that Arkansas could apply its own law. This issue is not present here.

[23] Va. Code § 65.1-93 (1968) provided:

> "**§ 65.1-93. Agreement as to compensation.**—If after injury or death, the employer and the injured employee or his dependents reach an agreement in regard to compensation or in compromise of a claim for compensation under this Act, a memorandum of the agreement in the form prescribed by the Industrial Commission shall be filed with the Commission for approval, and *if approved, the same shall be binding, and an award of compensation entered upon such agreement shall be for all purposes enforceable by the court's decree* as elsewhere provided in this Act, and if not approved, the same shall be void." (Emphasis added.)

Section 65.1-93 then provided:

> "Such agreement may be approved only when the Commission, or any member thereof, is clearly of the opinion that *the best interests of the employee or his dependents will be served there-*

Thomas' assertion (Pet. Br. 21), this approval was not "largely a ministerial act." Section 65.1-93 expressly directs the Commission to approve the agreement "only when the Commission, or any member thereof, is clearly of the opinion that the best interests of the employee or his dependents will be served thereby . . . ."

Once approved by the Virginia Industrial Commission, a memorandum of agreement "shall be binding, and an award of compensation entered upon such agreement shall be for all purposes enforceable by the court's decree as elsewhere provided in this Act" (*ibid.*). The Act provides that an approved agreement can be enforced in court in the same manner as an award granted after a contest (Va. Code § 65.1-100 (1968)).[24] As this Court

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by; and approval of such agreement shall bind infant or incompetent dependents affected thereby. Any agreement entered into during the pendency of an appeal to the Supreme Court of Appeals shall be effective only with the approval of the Commission as herein provided." (Emphasis added.)

A 1971 Amendment changed the reference to "Supreme Court of Appeals" to "Supreme Court."

[24] This provision stated:

"**§ 65.1-100. Judgment on agreement or award; enforcement of certain fines and decisions.**—Any party in interest may file in the circuit or corporation court of the county or city in which the injury occurred, or if it be in the city of Richmond then in the circuit or law and equity court of such city, *a certified copy of a memorandum of agreement approved by the Commission,* or of an order or decision of the Commission, or of an award of the Commission, unappealed from, or of an award of the Commission affirmed upon appeal, whereupon *the court, or the judge thereof in vacation, shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though such judgment had been rendered in a suit duly heard and determind by the court.* The fines imposed and decisions rendered under §§ 65.1-106, 65.1-107 and 65.1-127, shall be enforceable as provided herein for the enforcement of other decisions, orders or awards of the Commission. If such injury occurred outside the State, then such certified copy of the memorandum of agreement, order, decision or award may be filed in the circuit or corporation court of the county or city wherein the same might be brought as an action at law or suit in equity." (Emphasis added.)

This section was replaced in 1976 with Va. Code § 65.1-100.1, which provides that orders and awards of the Industrial Commission may be enforced the same way as orders of the circuit courts.

has recognized, judicial enforcement in Virginia of approved agreements and compensation awards is "purely ministerial." *Dillard* v. *Virginia Industrial Commission*, 416 U.S. 783 at 786 (1974), citing *Richmond Cedar Works* v. *Harper*, 129 Va. 481, 106 S.E. 516 (1921). Furthermore, an approved agreement can be modified by the Industrial Commission only in the manner that a final award can be modified. *Dillard, supra*, 416 U.S. at 788 n.5, citing *Manchester Bd. & Paper Co.* v. *Parker*, 201 Va. 328, 111 S.E.2d 453 (1959). In short, "an agreement, when approved by the Commission, is binding upon the parties and, in effect, is an award." *Meade* v. *Clinchfield Coal Co.*, 215 Va. 18, 205 S.E.2d 410 at 411 (1974).

Consequently, the suggested distinction between an approved settlement and an award must be disregarded. Under Virginia law, each is entitled to identical effect. In *Harding* v. *Harding*, 198 U.S. 317 (1905), the Court held that, where the first state gave a judicially approved consent decree the effect of a judgment, other states must give that decree full faith and credit. The same rationale applies here, and requires that an agreement approved by the Virginia Industrial Commission be given the same full faith and credit as an award made after a contest.[25]

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[25] Beyond that, the suggested distinction might only encourage employers to contest claims solely so that any award would be entitled to full faith and credit. This would hardly be conducive to efficient management of the workmen's compensation system. An *amicus* brief submitted in *Dillard* estimated that about 95% of all workmen's compensation claims are settled by agreement (416 U.S. at 785 n.2).

2. *The Virginia Award Could Not Have Been Modified to Grant Thomas Additional Compensation for Permanent Total Disability.*

Thomas next asserts that the award of Virginia compensation under the agreement approved by the Virginia Industrial Commission is not final because it could have been modified by the Commission to provide additional compensation. He contends that the District of Columbia award for permanent total disability was not inconsistent with the Virginia award (Pet. Br. 22): "Since the Virginia award is, at most, a resolution of the claimant's rights to temporary total disability benefits, the District's award for permanent total disability is consistent with the Virginia award and constitutes no collateral attack on its validity."

This totally ignores Virginia law. Thomas did not receive an award in Virginia for "temporary total disability"; he received an award under a provision providing compensation for "total incapacity." That provision allowed compensation for "total incapacity," with a weekly maximum of $62 and a total maximum of $24,800 (Va. Code § 65.1-54 (1968), as amended by 1970 Va. Acts, ch. 470):

> **"§ 65.1-54. Compensation for total incapacity.**—When the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total incapacity, a weekly compensation equal to sixty per centum of his average weekly wages, but not more than sixty-two dollars nor less than fourteen dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed twenty-four thousand eight hundred dollars."

To be sure, another provision of the Act allowed compensation for "total and permanent incapacity," but that

provision granted such compensation pursuant to the terms of the provision under which Thomas received his award, with the same maxima and minima.[26]

In short, Thomas received the maximum amount payable in 1971 under the Virginia workmen's compensation statute for his total disability. The granting to Thomas of additional compensation, such as the District of Columbia has tried to do here, would be beyond the power of the Virginia Industrial Commission. As a matter of Virginia law, Thomas' award is final. As a matter of full faith and credit, the Virginia award must be treated as final in the District of Columbia.

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[26] Va. Code § 65.1-56 (1968), as amended by 1970 Va. Acts, ch. 470, provided in relevant part:

> **"§ 65.1-56. Cases in which incapacity shall be deemed to continue for periods specified in section; compensation.**—In cases included by the following schedule the incapacity in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein and shall be in lieu of all other compensation:
>
> * * * *
>
> "(18) The loss of both hands, both arms, both feet, both legs or both eyes, or any two thereof, in the same accident, or an injury for all practical purposes resulting in total paralysis as determined by the Commission based on medical evidence, or an injury to the brain resulting in incurable imbecility or insanity, shall constitute total and permanent incapacity to be compensated according to the provisions of § 65.1-54.
>
> * * * *
>
> "The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maxima and minima as set out in § 65.1-54."

In an amendment after Thomas' award, Section 65.1-54 was changed to allow compensation for "total and permanent incapacity" to continue for life without limit (Va. Code § 65.1-54 (1973)).

III

EVEN IF *McCARTIN* IS DEEMED APPLICABLE TO THIS CASE, THE COURT OF APPEALS CORRECTLY HELD THAT THE FULL FAITH AND CREDIT CLAUSE BARS THE GRANTING OF THE DISTRICT OF COLUMBIA AWARD.

Even if one were to apply to this case the language in *McCartin* (quoted above, p. 26) stating that one should determine whether the first state intended to preclude further awards elsewhere, the decision below should still be upheld. The Fourth Circuit correctly interpreted Virginia law as precluding recovery of compensation awards in other jurisdictions.[27]

The literal language of the Virginia Workmen's Compensation Act demonstrates that it was intended to be the sole remedy of an injured employee against his employer.[28] Section 65.1-40 (1968) states: "The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident *shall exclude all other rights and remedies* of such employee, his personal representative, parents, dependents or other next of kin, *at common law or otherwise*, on account of such injury, loss of service or death." (Emphasis added.) In addition,

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[27] It should be borne in mind that the decision below was rendered by a court whose circuit includes Virginia and whose judges are more familiar than other courts of appeals with Virginia law. Moreover, the Virginia Supreme Court in the past has ratified statements by the Fourth Circuit on the exclusivity of Virginia's workmen's compensation law. Accordingly, the Fourth Circuit's interpretation of Virginia law is entitled to considerable deference. See *Butner* v. *United States*, 440 U.S. 48 at 58 (1979); *Bishop* v. *Wood*, 426 U.S. 341 at 345-46 (1976).

[28] Under Va. Code § 65.1-23 (1968), an employee could have exempted himself from coverage of the Act if he had done so before his injury. Thomas did not do so.

Section 65.1-103 provides that an employer subject to the Act must purchase insurance or furnish proof of financial ability to self-insure and that "[w]hile such insurance remains in force he or those conducting his business shall *only be liable* to an employee for personal injury or death by accident *to the extent and in the manner herein specified.*" (Emphasis added.)[29]

Virginia case law fully supports the plain language of the statute. In no case has a recovery in addition to that provided by the Virginia Workmen's Compensation Act been given an employee against his employer.[30] Rather, that Act has been construed to prohibit suits against an employer by an illegally employed minor (*Humphries* v. *Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926)), and suits against fellow employees are barred for injuries that occur during the course of employment (*Fetig* v. *Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946); *Lucas* v. *Biller*, 204 Va. 309, 130 S.E.2d 582 (1963); *Brown* v. *Reed*, 209 Va. 562, 165 S.E.2d 394 (1969)). Further, an injured employee of a subcontractor cannot bring suit against other subcontractors or a contractor engaged in the same business. *Anderson* v. *Thorington Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959); *Sykes* v. *Stone & Webster Eng. Corp.*, 186 Va. 116, 41 S.E.2d 469 (1947). See generally *Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, 59 Va. L. Rev. 1400 at 1632 (1973).

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[29] Va. Code §§ 65.1-103, 65.1-104 (1968), which have since been amended in ways not relevant here, are set forth *infra* in the appendix.

[30] Under Va. Code § 65.1-106 (1968), an injured employee might sue his employer at common law if the employer failed to purchase workmen's compensation insurance or furnish proof of ability to self-insure, as required by the Act. But even in such a case, acceptance of a workmen's compensation award would bar further suit against the employer, for an employee is entitled to "only one full recovery." *Delp* v. *Berry*, 213 Va. 786, 195 S.E.2d 877 at 879 (1973).

The cases have made it clear that the legislative purpose behind the exclusive remedy provision is to limit an employee's recovery so that the rights of those involved in a business are determined solely by the Virginia statute. In *Fetig* v. *Chalkley*, *supra*, the Virginia Supreme Court emphasized this point in enunciating (38 S.E.2d at 75):

> "The fundamental purpose of the act is to give compensation for accidental injuries within the hazards of the employment. The act does not apply to accidents outside the field of industrial hazards. *Within that field the only remedies of the employee are those prescribed by the Act.* . . .
>
> "It seems clear that it was the legislative intent to make the act exclusive in the industrial field so that, in the event of an industrial accident, *the rights of all those engaged in the business would be governed solely thereby.*" (Emphasis added.)

The Fourth Circuit made the same point in *Doane* v. *E. I. duPont de Nemours & Co.*, 209 F.2d 921 at 926 (1954):

> "The purpose of the Virginia statute as interpreted by its highest court is to *limit the recovery of all persons engaged in the business under consideration to compensation under the act*, and to deny an injured person the right of recovery against any other person unless he be a stranger to the business." (Emphasis added.)

In *Rea* v. *Ford*, 198 Va. 712, 96 S.E.2d 92 at 96 (1957), the Virginia Supreme Court quoted this passage in *Doane* and said: "We agree with that reasoning and conclusion."

This legislative purpose applies with the same force to successive awards granted in other jurisdictions as to common law suits against the employer. The purpose of

having one forum for setting an injured employee's compensation would be significantly undermined if the employee could then seek further relief in other jurisdictions.[31]

No case cited by Thomas (or the Department) is contrary to this conclusion. To the extent that such cases bear on the matter at all, they support the conclusion that the Virginia Act is the exclusive remedy against the employer. *Veale* v. *Norfolk & W. Ry. Co.*, 205 Va. 822, 139 S.E.2d 797 (1965), and *Fauver* v. *Bell*, 192 Va. 518, 65 S.E.2d 575 (1951), merely hold that an injured employee could sue third parties in tort when they were "strangers" to the business. *Griffith* v. *Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942), held only that an employee could sue his employer in tort in a situation where the Industrial Commission had held that the injury had not come in the course of employment and thus was not compensable under the statute.[32] The court

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[31] It was neither irrational nor particularly unusual for Virginia to intend to preclude further awards in other jurisdictions. The Federal government itself on occasion has adopted compensation statutes that expressly preclude the granting of awards under state workmen's compensation laws: 5 U.S.C. § 8173 (dealing with employees of nonappropriated fund instrumentalities); 42 U.S.C. § 1651(c) (dealing with persons employed at military bases outside the United States). It has also adopted a statute barring a successive award by the Federal government (42 U.S.C. § 1705, discussed in note 15 *supra*).

[32] *Griffith* disposes of the contention that the decision below is somehow inconsistent with *Newport News Shipbuilding & Dry Dock Co.* v. *Director*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979). (Pet. Br. 13; DOL Br. 18-19.) In *Newport News*, the Virginia Industrial Commission held that the evidence had not established a causal relationship between employment and an employee's disease. The employee then filed a claim under the Longshoremen's and Harbor Workers' Compensation Act, which has a different standard for determining causality, and was granted compensation. The Fourth Circuit held in reliance on *Griffith* that a decision that an employee's injury was not within the scope of the Virginia Workmen's Compensation Act did not bar the employee

said (20 S.E.2d at 534): "Our conclusion is that the Workmen's Compensation Act is exclusive in so far as it covers the field of industrial accidents, but no farther." Since the injury to Thomas is within the scope of the Virginia statute, it is exclusive as to him.

Moreover, contrary to the claim of Thomas, the Fourth Circuit's construction is not undercut by the fact that in limited instances Virginia law would allow compensation under its statute following the grant of compensation in another jurisdiction. Where an injury occurs outside the state, Virginia might allow an award under its own law for an injury that would have been compensable if it had occurred in Virginia if (1) "[t]he contract of employment was made in this State," (2) "[t]he employer's place of business is in this State," and (3) "[t]he residence of the employee is in this State" (Va. Code § 65.1-61 (1968)).[33] Such an award is subject to the

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from seeking some other form of relief. In contrast, Thomas was granted an award under the Virginia Act and, as the cases discussed in the text make it clear, that statute is exclusive remedy for injuries within its ambit.

Biggs v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966), the other Fourth Circuit case cited (Pet. Br. 12), did not consider the issue of whether the Virginia Workmen's Compensation Act constituted an employee's exclusive remedy.

[33] In full, Va. Code § 65.1-61 (1968) provided:

> "§ 65.1-61. **Foreign injuries.**—When an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if:
>
> (1) The contract of employment was made in this State;
> (2) The employer's place of business is in the State; and
> (3) The residence of the employee is in this State;
>
> "Provided the contract of employment was not expressly for service exclusively outside of the State.
>
> "But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act."

A 1976 amendment deleted subdivision (3).

condition that the employee's total compensation cannot exceed that allowed by Virginia: "But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act" (*ibid.*).

This provision does not affect Thomas, because his injury occurred in Virginia. Instead, it is claimed that this provision reflects upon the intent of the Virginia legislature—that it shows Virginia could not have intended to bar other jurisdictions from granting successive awards when it allowed itself to do so (Pet. Br. 16; see also DOL Br. 15-16).

But this provision persuasively supports the Fourth Circuit's conclusion that Virginia intended its award in this case to be exclusive. The provision allows that, in those instances where Virginia has significant interest in the employment relationship, it will bring an employee's compensation up to the level allowed by Virginia law—if consistent with full faith and credit.

The fact that the provision does not allow the employee's total compensation from all jurisdictions to exceed that permitted by the Virginia statute shows that the legislature intended—clearly intended—that employers' maximum obligations would be determined by that statute. See *Gasch* v. *Britton*, 202 F.2d 356, at 360-61 (D.C. Cir. 1953) (adopting this rationale in similar circumstances), cited in *Pettus* v. *American Airlines*, *supra* (587 F.2d at 631). Here, Thomas received the maximum permitted under Virginia law.

Thomas (Pet. Br. 16-17; see also DOL Br. 15) tries to make much of this Court's statement in *Magnolia* (320 U.S. at 443): "We have no occasion to consider what effect would be required to be given to the Texas award

if the Texas courts held that an award of compensation in another state would not bar an award in Texas . . . ." He claims that, because the Virginia statute would in some instances allow an award where another jurisdiction had earlier granted one, *Magnolia* is not on point. But the Court's caveat as to what it was *not* deciding cannot be elevated into a "rationale" (Pet. Br. 16) for what it was deciding.

Here, Thomas postures two reasons why Virginia's willingness to grant a successive award is significant. The first is that it shows that Virginia does not intend to bar another jurisdiction granting an award after Virginia. But, as we have just seen, this is not so. The second reason apparently is that *McCartin* so limited *Magnolia* that any factual distinction between this case and *Magnolia* is significant. But, as shown above, pp. 26-28, *McCartin* rather than *Magnolia*, should be limited to its facts.

IV

THOMAS' ONE CAUSE OF ACTION FOR COMPENSATION IS INCLUDED WITHIN THE MANDATE OF THE FULL FAITH AND CREDIT CLAUSE.

Thomas claims—as indeed he must—that he had two causes of action, one under the Virginia statute and one under the District of Columbia statute. The only reason given for this contention is that the Virginia Industrial Commission will only apply the Virginia statute (Pet. Br. 18).[34] This contention is without merit.

To begin with, *Magnolia* explicitly rejected a suggestion that the Texas and Louisiana statutes formed the basis for two separate causes of action (320 U.S. at 443-44):

[34] While not putting the matter in terms of causes of action, the Department of Labor presents various arguments in favor of allowing successive awards (DOL Br. 22-30).

> "Respondent's injury in Texas *did not give rise to two causes of action* merely because recovery in each state is under a different statute, or because each affords a different measure of recovery. . . . The grounds of recovery are the same in one state as in the other—the injury to the employee in the course of his employment. The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his *whole case at one time*." (Emphasis added.)

Here as well, Thomas' ground for recovery under both the Virginia statute and the District of Columbia statute is his back injury.[35] The same evidence would have sustained a claim under either statute: one jackhammer, one back, one injury. Inescapably, there is only one cause of action. *Restatement of Judgments*, § 61 (1942).

Moreover, any attempt to avoid *Magnolia* on the ground that the Virginia Industrial Commission could not try Thomas' claim under District of Columbia law must fail. Virginia has not given its Industrial Commission the authority to try workmen's compensation claims under the laws of other jurisdictions, but there is no constitutional reason why Virginia could not have allowed the Commission to try such claims.[36] In effect, Virginia has determined as a matter of choice to apply its own work-

[35] Compare Va. Code § 65.1-7 (1968) ("Unless the context otherwise requires, 'injury' and 'personal injury' mean only injury by accident . . . arising out of and in the course of the employment . . .") with 33 U.S.C. § 902(2) ("The term 'injury' means accidental injury or death arising out of and in the course of employment . . . ."). Thus, under both statutes the central prerequisite for compensation is injury by accident in the course of employment.

[36] See *Crider* v. *Zurich Ins. Co.*, 380 U.S. 39 (1965), where the Court held that Alabama could entertain a suit in its courts by one of its residents injured in the state under the Georgia workmen's compensation statute, even though that statute provided that claims under it could only be heard by a Georgia administrative agency.

men's compensation law, rather than some other jurisdiction's law, to claims brought before the Virginia Industrial Commission.[37]

Thomas' position for present purposes is no different from that of a plaintiff in a tort, wrongful death, or contract action. Clearly, a plaintiff who has brought to judgment a tort or contract action cannot bring a successive suit on the same claim in another jurisdiction on the ground that the plaintiff might gain the benefit of a more favorable law in the other jurisdiction. "A judgment in tort or contract is not immune from the requirement of full faith and credit because the successful plaintiff could have maintained his suit under the law of other states and have secured a larger recovery in some . . ." (*Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. at 445). Nor can a plaintiff in a wrongful death action who sues successfully in a state that applies a wrongful death statute containing a limit on damages then successfully bring an action in another jurisdiction that will apply a law without such a limit (*Semler* v. *Psychiatric Institute*, 575 F.2d 922 (D.C. Cir. 1978)).

There is certainly no basis for distinguishing workmen's compensation awards from judgments in tort or contract actions on the ground of policy. It is doubtful

[37] Virginia's decision to apply its Workmen's Compensation Act is a reasonable one: "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Alaska Packers Association* v. *Industrial Accident Comm'n*, 294 U.S. 532 at 547 (1935). Certainly, as the state where the injury occurred, Virginia had a sufficient interest here to apply its own law to Thomas' claim. *Carroll* v. *Lanza*, 349 U.S. 408 (1955); *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493 (1939). The situation here is like that in *Pacific Employers Ins. Co., supra*, where it was said (306 U.S. at 500): "While in the circumstances now presented, either state, if its system for administering workmen's compensation permitted, would be free to adopt and enforce the remedy provided by the statute of the other, here each has provided for itself an exclusive remedy for a liability which it was constitutionally authorized to impose."

at best to claim that the District of Columbia has a greater interest in compensating injured workmen than in seeing that persons injured by torts or breach of contract are compensated.[38]

Beyond that, this Court has often held the Full Faith and Credit Clause overrides considerations of local policy. Four examples suffice: *Yarborough* v. *Yarborough*, 290 U.S. 202 (1933), held that South Carolina must honor a Georgia judgment limiting a father's support obligations to his daughter, even though the daughter lived in South Carolina. *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908), held that Mississippi must enforce a Missouri judgment based on a contract made in Mississippi, despite the fact that the contract constituted illegal gambling in Mississippi. *Durfee* v. *Duke*, 375 U.S. 106 (1963), held that Missouri courts must honor a decision on title rendered in Nebraska, even though the land in question was allegedly in Missouri. And *Christmas* v. *Russell*, 72 U.S. (5 Wall.) 290 (1866), held that Mississippi must enforce a judgment entered elsewhere against one of its residents, even though the underlying action would have been barred by the statute of limitations in Mississippi.[39]

In short, the Full Faith and Credit Clause has long been held to override policy considerations at least as

[38] In any event, an approach that only considers the District of Columbia's policy interest in this case overlooks Virginia's policy. The limitations may well represent a considered judgment that, in return for giving up its common law defenses to employee claims, there should be a limit on the amount of an employer's liability for compensation; a successive District of Columbia award would undercut this policy. We are at a loss to understand the suggestion that Virginia's policy may constitute a mere attempt to lure business to the state (DOL Br. 25 n.17).

[39] To the same effect, see *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949); *Morris* v. *Jones*, 329 U.S. 545 (1947); *Titus* v. *Wallick*, 306 U.S. 282 (1939); *Milwaukee County* v. *M. E. White Co.*, 296 U.S. 268 (1935); and *Kenney* v. *Supreme Lodge*, 252 U.S. 411 (1920).

substantial as those of the District of Columbia in compensating Thomas, and policy furnishes no basis for Thomas to evade a defense based on that clause. The Court rejected similar policy arguments in *Magnolia* (320 U.S. at 440-41), and was right to do so. The prevailing of the Full Faith and Credit Clause over local policies "is part of the price of our federal system." *Williams* v. *North Carolina*, 317 U.S. 287 at 302 (1942).

It is also suggested that workmen's compensation claims should be distinguished from tort or contract actions because, while a court in a tort or contract action can hear and decide choice of law issues, an industrial commission in a workmen's compensation case has its governing law fixed by statute (DOL Br. 27-28). This argument, too, must fail.

First, there is no constitutional requirement that a court in the forum state "vindicate" (see DOL Br. 28) the interests of other states through choice of law. The forum state need not consider the interests of other states at all. It may apply its own law to a case so long as its own interests in the case are not "too slight" or "too casual" (*Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179 at 182 (1964)).[40]

Nor does the opportunity to litigate choice of law questions furnish a basis for distinguishing workmen's com-

[40] The claim in the Department of Labor's brief (DOL Br. 27-28) that choice of law provides an opportunity to vindicate the interests of nonforum states apparently assumes that choice of law will be by "interest analysis." But in fact states are free to use other choice of law methods, like the place of wrong in tort cases, that do not weigh at all the interests of concerned states. See *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 at 516 (1953), quoted at p. 22 *supra*. In this regard, see *Carroll* v. *Lanza*, 349 U.S. 408 (1955), where a federal court in Arkansas, the state where the injury occurred, was allowed to apply Arkansas law to a claim by an injured worker even though the worker resided in Missouri and had made his employment contract in Missouri. Surely, Missouri's interests, which were weightier than Arkansas', were not "vindicated" by this choice.

pensation awards from tort or contract actions when viewed from the standpoint of the parties. To begin with, a court's choice of law rules are frequently settled by prior precedents; the choice may even be fixed by statute (see Uniform Commercial Code § 1-105). In these cases, a plaintiff's right to litigate over choice of the governing law is likely to be meaningless. Beyond that, it would appear that, if any plaintiff should be entitled to relitigate a claim in another jurisdiction, it is a plaintiff who unsuccessfully litigates a choice of law question. Such a plaintiff might have chosen the first forum in the belief that it would have chosen a more favorable law than that it did apply. By contrast, a workmen's compensation claimant knows precisely what law an industrial commission will apply. Such a claimant cannot reasonably claim surprise at the choice of governing law.

Finally, it is claimed that workmen's compensation awards should be treated differently from judgments in tort or contract because otherwise there will be "an unfortunate opportunity for employers to engage in overreaching" by inducing employees to agree to compensation in the least advantageous forum (DOL Br. 29). But surely the state that issued the award is fully competent to deal with instances of employer misconduct. For example, Virginia would allow awards to be vacated on the grounds of "fraud, imposition and mistake" when applications to vacate are "seasonably made" (*Harris* v. *Diamond Const. Co.*, 184 Va. 711, 36 S.E.2d 573 at 577, 578 (1946)). Thomas has never sought to vacate his Virginia award on any of these grounds.

Consequently, the possibility of misconduct by a few employers or employees furnishes no basis for establishing a special exception to the general rule that full faith and credit must be given. This Court long ago refused to carve out such an exception when it was alleged that a judgment had been secured by fraud (*Christmas* v.

Russell, 72 U.S. (5 Wall.) 290 (1866)),[41] and there is even less reason to do so here, where it is only intimated that misconduct *might* occur.[42]

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[41] In *Christmas*, the Court held that a state could not refuse enforcement of another state's judgment on the ground of fraud in securing the judgment if the judgment could not be collaterally attacked on that ground in the judgment state.

[42] In stark contrast to the straightforward thrust of his brief and argument, Thomas adopts a florid tone in his Conclusion (Pet. Br. 22-24). The essence of his disputation is the unsupported allegation that "His employer, The Washington Gas Light Company, was a corporation doing business in the District of Columbia. Recognizing the obvious advantage in the Virginia Act, the employer seized on the fortuity of the injury occurring in Virginia and directed its employee to that forum to seek compensation."

The Department of Labor has filed a brief as "Federal Respondent." Conceding that workmen's compensation must be treated "within statutory limitations" (DOL Br. 22) and that workmen's compensation must be handled quickly (DOL Br. 10), the Department nevertheless creates an unfair atmosphere for the consideration of the Thomas case. At the end of its brief (DOL Br. 29), the unsupported allegation is made that an injured employee "often" is in no position to make an "informed choice" because he lacks knowledge and being motivated by a need for quick money is "likely" to accept any "reasonable offer." On the other hand, an employer, being generally aware of the laws involved, "may be motivated to steer the employee toward an award in a less favorable jurisdiction" and thereby "overreach." (DOL Br. 29-39).

These suggestions must stand corrected.

WGL is incorporated in both Virginia and the District of Columbia. It engages in the purchase, distribution, and sale of natural gas at retail in the Washington metropolitan area, which includes the District of Columbia and adjoining areas of Virginia and Maryland, and it has employees working in all three jurisdictions. Through several wholly owned subsidiaries, it conducts other operations in West Virginia, Louisiana and Oklahoma. Because of the nature of its business, WGL may be fairly classified as a "regulated company in a regulated industry." Its rates are subject to the regulatory agencies of three jurisdictions and to certain regulation by several federal agencies. It uses a Uniform System of Accounts. It adheres to the regulations of the Securities and Exchange Commission and related regulations of Virginia and the District of Columbia. It pays its taxes. As an employer, its December 1978 list of retirees included 430 employees each with over 30 years of service.

In closing, it should be observed that this case has ramifications running far beyond its facts. The Benefits Review Board has been granting awards under the District of Columbia workmen's compensation law to employees whose connections with the District of Columbia are tenuous at best. For instance, in *Director* v. *National*

First chartered in 1848, WGL has paid dividends on common stock for each of the last 128 years. Its longevity is due in large part to meticulous attention to government regulations and statutory enactments.

Insofar as the case at bar is concerned, the relevant facts are these: WGL maintains its Operations Center in Springfield, Virginia, and Thomas was working out of that Center. When Thomas was injured in Arlington, Virginia. Virginia law clearly applied; on their face, the laws of the District of Columbia did not. (Note that even claims under the LHWCA are required to be filed in the district where the injury occurred; 33 U.S.C. § 913(a)). It was obvious that the matter be handled in Virginia. (Incidentally, in 1971, the weekly compensation payments available to Thomas were $62 in Virginia and $70 in the District of Columbia (see note 13 *supra*).

The claim of Thomas was properly handled by WGL and by the Virginia Industrial Commission. If Thomas believes otherwise, an action will lie in Virginia. Notwithstanding these remedies, and for whatever motive, he instituted legal proceedings in the District of Columbia and has been advised by the Court of Appeals that his action will not lie. The law is contrary to his claim.

Insofar as the statement of the Department of Labor can be said to reflect the facts of this case, the above-described remedies are clearly sufficient. A more broad import for those statements (as to employers in general) calls into question the role of the Department of Labor as administrator of the LHWCA. The nature of the broad situation which is suggested by that Department must have been apparent since the decision of this Court in *Magnolia*, some thirty-five years ago. Legislation could have been sought to require that employees be informed of alternative remedies. An absence of such legislative effort suggests that others were satisfied with the viability of the remedies such as Virginia provides for vacating awards on the grounds of fraud, imposition, or mistake.

Now, Thomas—aided by the Department of Labor—is before this Court. That is his right. But in the exercise of this right, neither he nor anyone else is entitled to becloud Washington Gas Light Company by innuendo or carefully turned phrases.

Van Lines, Inc., —— F.2d —— (No. 78-1259; D.C. Cir., Nov. 13, 1979), the Board granted compensation to a truck driver who resided in Virginia, was employed by a company that was located in Virginia, and was injured in New York. The only District of Columbia contact was the fact that the employee had regularly driven in the District of Columbia prior to his injury.[43]

The granting of compensation under District of Columbia law on the basis of such minimal contacts means that there are an untold number of employees who have previously received full compensation under the laws of other jurisdictions who would now be eligible for compensation under the District of Columbia law, if this Court should reverse the Fourth Circuit. Under the Benefits Review Board's interpretation of the LHWCA's statute of limitations, discussed above, pp. 13-16, these claims would never be untimely so long as the employer for any reason fails to file reports with the Department of Labor. Claims that employers might rightfully and reasonably have considered settled might be raised years later, perhaps even 30 years later.

This public interest in finality is one of the basic purposes behind the Full Faith and Credit Clause. As stated in *Riley* v. *New York Trust Co.*, 315 U.S. 343 at 348-49 (1942): "This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest."

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[43] See also *Director* v. *Boughman*, 545 F.2d 210 (D.C. Cir. 1976), where the Board granted an award under the District of Columbia statute to the family of a union representative who resided in California, was killed in California, and was directed in his work by a regional officer for the western United States. His only contacts with the District of Columbia were that the union's headquarters were there, payroll checks were issued from there, by inference it was the place of the employment contract, and the employee occasionally went there on business. (These facts do not appear in the *Boughman* case, but are related in *Director* v. *National Van Lines*, *supra*, slip. op. at 16-17.)

Virginia determined matters between Thomas and WGL, and the Constitution mandates that such determination be respected by every other jurisdiction. If Virginia's resolution of the matter were to appear inadequate, perhaps legislation could be contemplated. The Social Security Act might be amended to cover certain injuries, or new federal legislation might replace state compensation programs with a federal workmen's compensation law or set minimum federal standards for state programs.[44] The need for such laws must be determined by Congress. In the meantime, however, the existing law on full faith and credit should not be distorted by disregarding the plain teachings of *Magnolia* in a misconceived attempt, on the facts of this case, to ameliorate purported shortcomings in Virginia's Workmen's Compensation Act.

CONCLUSION

Wherefore, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[44] Legislation has been introduced that set as federal minima for state programs the "essential recommendations" in a 1972 report of the National Commission on State Workmen's Compensation Laws. See, *e.g.*, S. 420, 96th Cong., 1st Sess. (1979). One such recommendation is that there be no limit on compensation for total disability.

APPENDIX

APPENDIX

United States Constitution, Article IV, Section 1:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

28 U.S.C. § 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

28 U.S.C. § 1739:

> "All nonjudicial records or books kept in any public office of any State, Territory or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the

custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

"If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

"Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken."

33 U.S.C. § 913(a):

"(a) Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment."

33 U.S.C. § 930(f):

"(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section."

Act of March 4, 1927, ch. 509, § 3(a), 44 Stat. 1426 (codified at 33 U.S.C. § 903(a) (1970)):

"Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

D.C. Code § 36-501 (1973):

"The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irres-

pective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person."

Va. Code § 65.1-40 (1968):

"§ 65.1-40. **Employee's rights under Act exclude all others.**—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

Va. Code § 65.1-54 (1968), as amended by 1970 Va. Acts, ch. 470:

"§ 65.1-54. **Compensation for total incapacity.**—When the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total incapacity, a weekly compensation equal to sixty per centum of his average weekly wages, but not more than sixty-two dollars nor less than fourteen dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed twenty-four thousand eight hundred dollars."

Va. Code § 65.1-61 (1968):

"§ 65.1-61. **Foreign injuries.**—When an accident happens while the employee is employed elsewhere

than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if:

(1) The contract of employment was made in this State;

(2) The employer's place of business is in this State; and

(3) The residence of the employee is in this State;

Provided the contract of employment was not expressly for service exclusively outside of the State.

"But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act."

Va. Code § 65.1-93 (1968):

"§ 65.1-93. **Agreement as to compensation.**—If after injury or death, the employer and the injured employee or his dependents reach an agreement in regard to compensation or in compromise of a claim for compensation under this Act, a memorandum of the agreement in the form prescribed by the Industrial Commission shall be filed with the Commission for approval, and if approved, the same shall be binding, and an award of compensation entered upon such agreement shall be for all purposes enforceable by the court's decree as elsewhere provided in this Act, and if not approved, the same shall be void. Such agreement may be approved only when the Commission, or any member thereof, is clearly of the opinion that the best interests of the employee or his dependents will be served thereby; and approval of such agreement shall bind infant or incompetent de-

pendents affected hereby. Any agreement entered into during the pendency of an appeal to the Supreme Court of Appeals shall be effective only with the approval of the Commission as herein provided."

Va. Code § 65.1-100 (1968):

"§ 65.1-100. **Judgment on agreement or award; enforcement of certain fines and decisions.**—Any party in interest may file in the circuit or corporation court of the county or city in which the injury occurred, or if it be in the city of Richmond then in the circuit or law and equity court of such city, a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from, or of an award of the Commission affirmed upon appeal, whereupon the court, or the judge thereof in vacation, shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though such judgment had been rendered in a suit duly heard and determined by the court. The fines imposed and decisions rendered under §§ 65.1-106, 65.1-107 and 65.1-127, shall be enforceable as provided herein for the enforcement of other decisions, orders or awards of the Commission. If such injury occurred outside the State, then such certified copy of the memorandum of agreement, order, decision or award may be filed in the circuit or corporation court of the county or city wherein the same might be brought as an action at law or suit in equity."

Va. Code § 65.1-103 (1968):

"§ 65.1-103. **Duty to insure payment of compensation; effect of insurance.**—Every employer subject

to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified."

Va. Code § 65.1-104 (1968):

"§ 65.1-104. **Insurance or proof of financial ability to pay required.**—Every employer subject to this Act shall insure and keep insured his liability thereunder in some corporation, association or organization or State insurance fund authorized to transact the business of workmen's compensation insurance in this State or in some mutual insurance association formed by a group of employers so authorized, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due as provided for in this Act. In the latter case the Commission may in its discretion require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred. The State Treasurer shall be the custodian of the securities deposited by the employers under the requirements of this section, and for such services he shall receive a compensation of one twentieth of one per centum per annum of the amount of securities deposited with him, payable by the employer.

"It shall be satisfactory proof of the employer's financial ability to pay direct the compensation in the amount and manner when due, as provided for in this Act, and acceptable security, indemnity or bond to secure the payment of compensation liabili-

ties as they are incurred, if the employer shall show to the Industrial Commission that he is a member of an association or group of employers and as such is exchanging contracts of insurance with the employers of this and other states, through a medium as specified and located in their agreements between each other, and shall further file with the Industrial Commission a certificate of authority issued by the insurance department of any state to such group of employers or association, together with a sworn finanical statement showing the group of employers or association to be in solvent condition. But this paragraph shall in no wise restrict or qualify the right of self-insurance as hereinbefore authorized."

FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-116

In the Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

WADE H. MCCREE, JR.
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1. The District of Columbia Workmen's Compensation Act specifically applies to an injury to an eligible employee "irrespective of the place where the injury or death occurs." 36 D.C. Code § 501 (1973). Accordingly, the pre-1972 limitation of Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to injuries that are not otherwise covered by state law is no more applicable to the District of Columbia Act than is the other limitation of Section 3(a)—that the injuries have occurred on the navigable waters of the United States. Respondent Washington Gas Light Company asserts (Br. 19) that the decision to this effect in *Travelers Insurance Co.* v. *Cardillo*, 141 F. 2d 362 (D.C. Cir. 1944), is "wrong" and argues that Section 3(a) bars an action under the District of Columbia Act for

petitioner's injury (Br. 17-21). But the holding in *Travelers Insurance Co.* is the only sensible way to construe the statute and respondent points to no decision rejecting that holding, although countless awards have been made under the District of Columbia Act for injuries that were cognizable under the workers' compensation statutes of other states. Cf. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947) (District of Columbia award upheld in circumstances where Virginia statute was applicable). Indeed, respondent itself conceded this point before the administrative law judge, acknowledging that, but for the alleged preclusive effect of the Virginia award, petitioner's claim was covered by the District of Columbia Workmen's Compensation Act (Pet. App. 4a, 39a).

2. Respondent also contends (Br. 13-16) that petitioner's claim was barred by the one-year statute of limitations under the Act. However, the Benefits Review Board correctly held (Pet. App. 6a-7a) that the statute of limitations was tolled under 33 U.S.C. 930(f) because respondent did not file a report of the injury with the Department of Labor, as required under 33 U.S.C. 930(a). The purpose of the tolling provision, as respondent notes (Br. 15), is to prevent the disallowance of claims whose untimeliness may be traceable to the employer's failure to file the required injury report, thus eliminating a possible incentive for employers to withhold such reports. Congress was concerned that the lateness of the claim was due in some cases to ignorance on the part of the employee that would have been remedied had the administrative procedures under the Act been set in motion by the filing of an injury report. H.R. Rep. No. 1945, 75th Cong., 3d Sess. 9 (1938). That very purpose is implicated here. Respondent cannot seek the protection of

the statute of limitations when it failed to file the required report, particularly when it advances no justification for that failure.[1]

3. Respondent errs in its assertion (Br. 23) that the question in this case is whether the workers' compensation award made to petitioner is an "exception to the [full faith and credit] rule on judgments." The Full Faith and Credit Clause does not require that the District of Columbia give a greater preclusive effect to a Virginia award than does Virginia. Accordingly, the relevant inquiry, as the Court explained in *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), is whether the Virginia award has the effect, under Virginia law, of precluding an award under the workers' compensation statute of another state. Contrary to respondent's contention (Br. 28), that inquiry is not inconsistent with the Full Faith and Credit Clause. Rather, it is a prerequisite to implementation of the Clause to determine the extent of the preclusive effect of the Virginia award that must be honored in another state.

McCartin establishes a rule of construction for determining whether a workers' compensation award in one state has the effect of barring an award under the workers' compensation statute of another state. As

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[1]In addition, the statute of limitations had not run under Section 913(a) because "payment of compensation" was made for the injury. The courts have not agreed on whether payments in another state are included under this Section. Compare *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F. 2d 265 (7th Cir. 1930), with *Windrem* v. *Bethlehem Steel Corp.*, 293 F. Supp. 1 (D.N.J. 1968). As cases under state statutes have recognized, however, the policy embodied in the statute of limitations is not advanced by barring claims after the employer has recognized the existence of a compensable disability by making compensation payments (as opposed to medical payments) in any state. See *Ryder* v. *Insurance Co.*, 282 So. 2d 771, 774-775 (La. Ct. App. 1973). See also *Martin* v. *L. & A. Contracting Co.*, 162 So. 2d 870, 872-873 (Miss. 1964).

discussed in our opening brief (pages 22-30), there are strong policy reasons in favor of permitting supplemental awards. If such awards are prohibited, the interest of the second state is given no effect and the employee is denied benefits to which he would have been entitled had he been fully aware of his rights, despite the well-settled policy of construing workers' compensation statutes liberally in furtherance of their purpose to compensate injured employees. See *Industrial Commission* v. *McCartin*, *supra*, 330 U.S. at 628. These policy considerations warrant the continuing application of *McCartin* so that workers' compensation awards will not be barred by prior awards in another state unless the first state, by its use of "unmistakable language" (330 U.S. at 628), clearly intends its award to have such a preclusive effect. Thus, we do not disagree with respondent (Br. 44) that a state may not refuse to give full faith and credit to a sister state's judgment simply because of its own policy considerations. The question here, however, is whether, under *McCartin*, the Virginia award is intended to bar a supplemental District of Columbia award such that the District of Columbia must give it that preclusive effect.

In addition to the policy reasons supporting *McCartin*'s strict construction of state statutes in favor of permitting successive awards, we noted in our opening brief (pages 26-28) that several commentators have gone further to urge that the Full Faith and Credit Clause should not bar a supplemental workers' compensation award in a second state even if the first state clearly indicates that its award is intended to have such an effect. This theory rests on the peculiar nature of workers' compensation awards as limited administrative remedies created by statutes that

generally are not enforced by other states.[2] The argument advanced by these commentators lends added weight to the rule of construction established in *McCartin* in favor of supplemental awards, but the Court is not faced in this case with the fundamental question of whether a state can ever bar a supplemental award, because the Virginia statute manifests no intention to preclude other states' awards. Hence, this case is controlled by *McCartin*.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

[2]The theory does not depend, as respondent suggests (Br. 44), upon a constitutional requirement that the forum state apply an "interest analysis." In any tort suit involving choice of law, the choice of law determination is made by a court in the forum state. In each such case, of course, the law of some state will not be applied, but a choice is made. In the workers' compensation area, by contrast, a choice of law determination is not made because states generally will not adjudicate claims arising under the workers' compensation statute of another state. It is at least open to question whether a state has the power to bar the assertion in another state of a claim that the first state would not have adjudicated itself under any circumstances. See *Semler* v. *Psychiatric Institute*, 575 F. 2d 922, 929-930 n.41 (D.C. Cir. 1978).

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Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

REPLY BRIEF OF PETITIONER

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Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

REPLY BRIEF OF PETITIONER

The claimant, Halley I. Thomas, responds to the brief of the Washington Gas Light Company and petitions this Honorable Court for reversal of the judgment of the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED

I. Whether the plain language of the District of Columbia statutory provision, 33 U.S.C. § 930(f), tolling the one year limitation period, should be disregarded in order to disallow an employee's meritorious claim for compensation.

II. Whether an employee's meritorious claim for compensation in the District of Columbia is preempted merely because his injury is also compensable under the Virginia Workmen's compensation Act.

III. Whether the full faith and credit clause operates to make approval by the Industrial Commission of Virginia of a workmen's compensation agreement a bar to an award for permanent disability under the compensation law of the District of Columbia.

STATEMENT OF THE CASE

The petitioner, Halley I. Thomas, adopts and incorporates herein by reference the Statements of the Case set forth in his petitioner's brief on the merits and the brief for the federal respondent, Director, Office of Workers' Compensation Programs.

ARGUMENT

I. The Plain Language Of The District Of Columbia Statutory Provision, 33 U.S.C. § 930(f), Tolling The One Year Limitation Period, Should Not Be Disregarded In Order To Disallow An Employee's Meritorious Claim For Compensation.

The construction of § 30(f) of the Longshoremen's Act urged by the employer undermines the unambiguous language of the statute. The Act compels an employer to file a report of injury with the Deputy Commissioner within ten days of an employee's injury or death. 33 U.S.C. § 930(a). Under the District of Columbia Act, this mandate applies "in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs." 36 D.C. Code § 501. Despite being subject to this statutory duty, the Washington Gas Light Company neglected to file any such report of injury.[1] The consequences thereof are straightforwardly described by 33 U.S.C. § 930(f):

> Where the employer or the carrier has been given notice, or the employer . . . or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of Section 913 of this title shall not begin to run against the claim of an injured employee . . . until such report shall have been furnished as required

[1] That the employer may have filed an injury report in Virginia is of no avail. The Act specifies that the report must be "furnished as required by the provisions of subdivision (a) of this section." 33 U.S.C. § 930(f). The report must contain specified information and be sent to the Secretary of Labor and the "deputy commissioner in the compensation district in which the injury occurred." 33 U.S.C. § 930(a). Under the approved regulations, the "employer's report of an employee's injury shall be in writing on a form prescribed by the Director for this purpose." 20 C.F.R. § 702.202.

Moreover, the filing in Virginia could not possibly accomplish the purposes ascribed to the District report of injury. For these reasons, the District of Columbia Circuit has expressly rejected the argument that a Virginia report of injury satisfies the District of Columbia mandate. See *Director, OWCP* v. *National Van Lines, Inc.*, No. 78-1259 (D.C. Cir. 1979) (slip op.).

by the provisions of subdivision (a) of this section.

Traditionally, this Section has been literally and rigidly construed. For example, in *Aerojet-General Shipyards, Inc.* v. *O'Keefe,* 413 F.2d 793 (5th Cir. 1969), the Court considered the claim of an employee who had suffered an ankle injury in August of 1964. Within the statutory period, the employer filed a report concerning the injury. The employee was awarded compensation and never returned to work. While off the job, the injured workman was informed by a physician that he was suffering from arthritis and fibrosis which had been aggravated by his employment. For these injuries, he filed a claim in 1966. The employer challenged the timeliness of the claim despite its failure to file a second report. The Fifth Circuit announced that:

> We hold that the plain language of 33 U.S.C. § 930(f) requires an employer with knowledge of an injury, to file a report for that injury, whether or not the employee is at the same time disabled from an earlier injury. Therefore, the statute of limitations was tolled, and the employee's claim was timely filed regardless when he may have arguably received notice of a work-related disease.
>
> 413 F.2d at 796.

Washington Gas Light's objection that a literal interpretation of § 30(f) in the present case would be unduly mechanistic underestimates the importance of the employer's report of injury in the District of Columbia workmen's compensation scheme. The Longshoremen's Act is designed to be "almost self-executing." *Flowers* v. *Travelers Insurance Company,* 258 F.2d 220, at 225 (5th Cir. 1958). Benefits are encouraged to be paid promptly and voluntarily without the coercion of an award. 33 U.S.C. § 914(a). To that end, the Act places the onus upon the employer, rather than the employee, to take affirmative action with respect to industrial injuries. This approach is grounded in the notion that the employer is best equipped to protect the claimant's rights. In all likelihood, the employer possesses greater familiarity with the Act and the procedures involved in securing compensation benefits. Placing the burden on the employer insures that meritorious claims to compensation are not foregone merely due to the claimant's uninformed position. Hence, the Act mandates that the first installment of compensation benefits must be paid within fourteen days "after the employer has knowledge of the injury or death . . ." even without the coercion of a formal award. 33 U.S.C. § 914(b); *See also* 20 C.F.R. § 702.231. A failure to begin payment subjects the employer to a 10% penalty on any and all past due and unpaid installments. 33 U.S.C. § 914(e). The employer may only escape the voluntary initiation of compensation benefits by filing with the Deputy Commissioner a notice controverting the employee's right to compensation under the Act. 33 U.S.C. § 914(d).

The employer's report of injury is the catalyst in the system that triggers these provisions into operation. The success of the self-executing design of the Act hinges upon the filing of the employer's report of injury. The report signals that the employer has notice or knowledge of the accidental injury and "sets in train important substantive obligations *unless* the employer takes affirmative action to controvert liability." *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F.2d 794, at 799 (5th Cir. 1960). Upon filing the report, the

employer is required to decide quickly either to fish or cut bait—that is, pay or controvert. Thus, the Fifth Circuit did not overstate the point by noting that "... [t]he heart of any such system is the mandatory report of an injury by the employer within 10 days under § 930(a)." *Flowers* v. *Travelers Insurance Company,* 258 F.2d 220, at 225 (5th Cir. 1958).

To insure that employers do not sidestep these obligations, the Act suspends the one year limitation period until the report of injury is furnished. 33 U.S.C. § 930(f). The provision was added as an amendment to the statute when it became clear that some employers were disregarding the mandate to file injury reports. The full text of the relevant section of the committee report cited by the Respondent (Resp. Br. at 15), (H.R. Rep. No. 1945, 75th Cong., 3d Sess., at 9 (1938), quoted in S. Rep. No. 1988, 75th Cong., 3d Sess., at 9 (1938)) reads:

> It has sometimes happened that reports of injuries have not been transmitted to the deputy commissioner as required by the Longshoremen's Act and, subsequently, when the injured workman has filed claim for compensation after the time limitation fixed in the act has expired, this delay, rather than any lack of merit in the claim, has been relied on to avoid payment of compensation. *No doubt in some cases the delay in filing claim has been due to ignorance on the part of the employee, which would have been remedied if the procedures under the Act had been set in motion by the filing of the report of injury.* It may be that in some cases the report of injury has been withheld by the employer with the intention of defeating the employee's claim through the delay which might thus result. *In some cases, other payments, or payments as wages, have been made during the year limitation, thus diverting the attention of the employee from the necessity to file claim and, shortly after the expiration of the year, such payments have been stopped and the limitation pleaded in bar of the claim. The purpose of this amendment is to remove any possible motive to withhold such reports of injury* by mandating the bar of the limitation upon the right to file a claim begin to run only after such report of injury has been filed, in all cases in which the employer or insurance carrier in fact possessed the information upon which to make the report. (emphasis added)

Contrary to Washington Gas Light's position, disregard of the plain language of the statute would undercut the very purpose of the provision. The tolling provision was enacted to prevent the defeat of valid claims solely because of the claimant's ignorance of his statutory remedy. Such a purpose is undoubtedly relevant to the particular facts of the present controversy. Moreover, Mr. Thomas' uninformed acceptance of Virginia benefits is the kind of diversion from the more generous remedy available in the District of Columbia which Congress sought to frustrate.

It is abundantly clear, therefore, that the legislative purposes of the section are only served by its literal enforcement. Had the employer complied with the statute, Mr. Thomas would probably not be in the situation he is in now. As a general policy, the Deputy Commissioner's office, upon receipt of an injury report, mails to the employee a notice apprising him of his rights accompanied by a standard claim form. In addition, if an employer controverts the employee's right to compensation, a copy of the notice of controversion must be mailed to the claimant. 20 C.F.R. § 702.251.

Thus, the employee is again reminded of his right to compensation under District of Columbia law.

Instead, Mr. Thomas remained unaware of his rights. Unsuspectingly, Mr. Thomas accepted the much less generous benefits afforded by the Virginia compensation statute. Now the employer not only asks that the tolling provision be disregarded but also offers the Virginia settlement agreement as a *res judicata* bar to the District of Columbia award. The petitioner urges that the clear pronouncement of the statute, the legislative motives which prompted its enactment, and common notions of equity dictate otherwise.

II. An Employee's Right To Compensation In The District Of Columbia Is Not Preempted Merely Because His Injury Is Also Compensable Under The Virginia Workmen's Compensation Act

The Longshoremen's and Harbor Workers' Compensation Act was enacted in response to decisions by this Court which foreclosed previous congressional attempt to cover longshoremen by extending the coverage of the state compensation acts. The Senate committee endorsing the adoption of the Act reported that:

> If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation, but unfortunately, they are excluded from these laws by the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply state laws to their occupation.
>
> S. Rep. No. 973, 69th Cong., 1st Sess., at 16 (1927).

A special jurisdictional provision, 33 U.S.C. § 903(a), was included within the Act to confine its operation in a manner consistent with that purpose. The provision imposes a two-fold condition on the coverage of the Act which corresponds to the legislative intent. The injury must occur upon navigable waters and may not be validly compensable under a state compensation statute. This conditional coverage was "necessary in order to confine its provisions to cases in which under the grant to the United States of exclusive admiralty and maritime jurisdiction, the United States alone could validly provide compensation." *Travelers Insurance Company* v. *Cardillo,* 141 F.2d 362, at 364 (D.C. Cir. 1944).

The limiting provisions of Section 3(a) of the Longshoreman's Act are intimately related to constitutional concern over jurisdictional overlap in an area exclusively delegated to the federal government. Such fears are irrelevant to the Act's extension to the District of Columbia and the limitations should not be applied. While it is true that repeal by implication is not favored, it is obvious that § 3(a) cannot be applied to the District of Columbia statute without modification. The portion of the condition relating to navigable waters mst be disregarded or the District Act would represent no additional coverage beyond the Longshoremen's Act. Since some judicial modification is inevitable, this Court should be free to look beyond the literal language of the entire section and seek the genuine intent of Congress.

The true scope of the District of Columbia Act is reflected by its enacting section. That section provides that the District of Columbia Act should apply "in respect to the injury or death of an employee of an

employer carrying on any employment in the District of Columbia, *irrespective of the place where the injury or death occurs.*[2] 36 D.C. Code § 501. This language nullifies the narrow provision of § 3(a) of the Longshoremen's Act and implies a broad application for the District of Columbia Workers' Compensation Act. Surely, Congress was aware that injuries occurring in other jurisdictions would be compensable under other acts. Thus, the all-encompassing scope of the enactment section is not, in any practical sense, consistent with the Respondent's construction limiting the Act's coverage to the rare circumstance in which no other compensation act is applicable. Such a narrow interpretation is particularly inconceivable in view of the statutory presumption that "the claim comes within the provisions of this Act." 33 U.S.C. § 920(a).

In reliance upon these considerations, the District of Columbia Circuit resolved this issue in *Travelers Insurance Company* v. *Cardillo,* 141 F.2d 362 (D.C. Cir. 1944). The employee, a District of Columbia resident, was injured in Maryland.[3] His employer, a construction company principally located in the District, challenged a District of Columbia compensation claim on the basis of the state coverage condition of § 3(a). The District of Columbia Circuit reasoned:

> That Section 3(a) has no proper place in the District Act is obvious and the failure of Congress to

[2] The italicized language was added by the Senate Committee on the District of Columbia (S. Rep. No. 852, 70th Cong., 2nd Sess., at 1 (1928).

[3] In a companion case, the court also held that compensability under the Virginia Workmen's Compensation Act did not preclude recovery in the District of Columbia. *Travelers Insurance Company* v. *Cardillo,* 141 F.2d 364 (D.C. Cir. 1944).

> expressly exclude it was perhaps due to inadvertence, but however that may be, the language of the enactment section of the District Act shows unmistakeably the precise extent and the precise limitations of its jurisdiction and coverage, and these must be given effect, or else the whole purpose of the Act would be lost, and this would be contrary to the established rule of statutory construction . . . To apply the limitations of the Section to the District of Columbia Act would destroy it, make it wholly inoperative and result in an absurdity. For as to the navigable waters it would be a meaningless duplication, and as to the exclusion of injuries compensable under State laws, it would be in the teeth of the language of the local law extending its provisions to cases of injury or death, irrespective of the place where either occurred.
>
> 141 F.2d at 364.

The District of Columbia Circuit's determination of this issue was made soon after the Longshoremen's Act was extended to the District. It has remained virtually unchallenged over the last thirty-five years. The District compensation law has been enforced in accordance with this longstanding precedent for the entire duration of the Act. Moreover, in 1972, one year after Mr. Thomas' injury, the § 3(a) exclusion of coverage for injuries compensable under state law was repealed from the Longshoremen's Act. Thus, any change in the interpretation of this now defunct provision will have little or no prospective jurisprudential value. The petitioner urges, therefore, that any preclusion of coverage for his injury in the District of Columbia based upon § 3(a) is unwarranted.

III. The Full Faith And Credit Clause Does Not Operate To Make Approval By The Industrial Commission Of Virginia Of A Workmen's Compensation Agreement A Bar To An Award For Permanent Disability Under The Compensation Law Of The District Of Columbia.

A. Proper application of this Court's directives in *Industrial Commission* v. *McCartin* compels affirmance of the District of Columbia award

The Fourth Circuit's result in *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), *cert. denied* —— U.S. —— (1979), upon which the decision in the instant case was founded, represented a sharp departure from the previously near universal interpretation of this Court's pronouncement in *Industrial Commission* v. *McCartin*, 320 U.S. 622 (1947).[4] Washington Gas Light's brief has also called for severe limitation of the *McCartin* decision. The petitioner urges that *McCartin* does not admit of such a narrow reading. Rather, accurately applied, *McCartin* controls the present controversy and requires a reversal of the Fourth Circuit.

1. *Magnolia* v. *McCartin*

Both parties agree that there is no irreconcilable conflict between *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), and *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947). However, there is considerable disagreement as to the distinction by which the two cases may be harmonized. Mr. Thomas urges that

[4] The *Pettus* decision and the Virginia Workmen's Compensation Act are considered in detail in an article to appear in the Washington & Lee Law Review Annual Fourth Circuit Review. *See Workmen's Compensation—Fourth Circuit Review*, 37 Wash. & Lee L. Rev. —— (1980).

both decisions, properly viewed, assist his claim for compensation in the District of Columbia.

The limitation of *McCartin* proposed by the Washington Gas Light Company slights the unmistakeable thrust of this Court's unanimous decision. The *McCartin* opinion begins by noting that the Illinois award was not a bar to a successive award in Wisconsin because it was only designed to be final and conclusive *within* the State of Illinois. The decision noted that "there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state." 330 U.S. at 627. Moreover, in view of the rule requiring liberal construction in favor of the injured workman, the Court ruled that one award could not constitute a bar to a successive award without "unmistakeable language by a state legislature or judiciary." 330 U.S. at 628.

The opinion notes in *dicta* that the claimant's care in reserving his right to recovery in Wisconsin strengthened the propriety of the result. However, the Court was careful to preempt any future limitation of *McCartin* which would obscure the true impact of its decision. Following its discussion of the contractual reservation, the Court returned to its original rationale. The possibility of any distinction based upon the contractual reservation was extinguished by the announcement that "the reservation spells out what we believe to be implicit in that Act—namely that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state." 330 U.S. at 630.

In truth, it is *Magnolia* which is unique. The *Magnolia* majority founded its conclusion that the Texas award was a complete and final determination of all the employee's rights arising from the accident upon the peculiar design of the Texas compensation statute. The Court construed the Texas exclusive remedy provision as encompassing extrajurisdictional compensation recovery within its preclusive purview. The finding was predicated largely upon the implication drawn from Texas judicial decisions barring successive awards in Texas following a prior compensation recovery elsewhere. The importance of this unconventional circumstance is reflected by the majority's statement that "[w]e have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas . . ." 330 U.S. at 443. Therefore, the present case presents the exact question upon which the *Magnolia* majority reserved judgment.

The real lesson of *Magnolia* and *McCartin* is that the preclusive scope and reach of the compensation award received by the claimant, as gleaned from the governing statute and the judicial decisions thereunder, is the ultimate measure of such a controversy. In *Magnolia,* the singular design of the Texas statute was affirmatively recognized as a limitation on the majority decision. Mr. Thomas' appeal to this Court is in harmony with that limitation. On the other hand, the distinction offered by Washington Gas Light was expressly dismissed by the *McCartin* Court. Therefore, on the basis of this Court's own precedent, the inquiry for this case must be whether the Virginia compensation agreement was intended to extinguish all of the

claimant's rights to compensation arising out of the accident, irrespective of where they might arise. On the basis of the same precedent, the answer to this inquiry lies in the structure of the Virginia Workmen's Compensation Act and the line of Virginia decisional law construing that Act.

2. *McCartin did not alter the mandate of the Constitution*

If the Virginia agreement is deserving of full faith and credit, the District of Columbia must accord that agreement the same weight and effect that Virginia does. It does not follow, however, that this Court's inquiry is restricted to whether or not a further recovery is available in Virginia. The District of Columbia is surely not compelled to give more faith and credit to the agreement than Virginia intended. Hence, if Virginia does not view its compensation remedy as having a preclusive effect on other compensation statutes, whether or not a further award is available in Virginia is irrelevant.

Part of the "effect" of the award in Virginia is what effect it is intended to have on other remedies. Thus, as a threshold inquiry, the nature of the remedy provided must be examined to determine if it is of such a character as to constitute a complete resolution of all the rights arising out of the accident. If it is not, there is no considered judgment by a sister state which, given full faith and credit, would constitute a bar to successive action by the District of Columbia. It is only when the award is intended to extinguish all other rights including parallel workmen's compensation remedies, that a second question is reached, to wit: Have the proceedings used in pursuit of the remedy

produced a record or judgment sufficiently final in nature and effect to be accorded full faith and credit and enforced against a sister state to accomplish its preclusive purpose?

The petitioner urges that this Court need not reach the second question. In its most elementary terms, this case is not principally a question of what state actions are entitled to full faith and credit. The real question is whether or not there is any conflict between the two compensation remedies which gives rise to a full faith and credit issue. The chief thrust of Mr. Thomas' position is that there is not. However, Mr. Thomas additionally urges that, should a conflict be found, the agreement by which he received his benefits should not be used to bar the District of Columbia award.

B. Given full faith and credit, the Virginia agreement did not constitute a bar to the District of Columbia award

1. *By virtue of an express statutory declaration*

The precedents cited by the Washington Gas Light Company in defense of the preclusive effect of the Virginia exclusive remedy provision on collateral compensation statutes ultimately beg the question. The broad language of the cases cited by the employer is not very helpful as it is thoroughly consistent with the general purpose of substituting compensation benefits for damages actions in the field of industrial accidents.[5]

[5] Contrary to the employer's claim, little weight can be given the Fourth Circuit's interpretation of the scope of the Virginia exclusive remedy provision in *Pettus*. In *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979), another panel found that "it is obvious, especially from our discussion of the Virginia 'exclusivity' provision, that *Industrial Commission* v. *McCartin*, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947), not *Magnolia*, is controlling in this case, and that no valid full faith and credit issue is raised by the federal award." 583 F.2d at 1278. *See also, Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966).

More importantly, an expansive reading of this language is inconsistent with other pronouncements by the Supreme Court of Virginia. That Court has on more than one occasion stated that: "The rights and remedies granted . . . are exclusive only as to an employee and his employer, and only his right to sue his employer for damages is barred by the acceptance of compensation under the Act." *Veale* v. *Norfolk and W. Ry.*, 205 Va. 822, at 825, 139 S.E.2d 797, at 799 (1965); *Fauver* v. *Bell*, 192 Va. 518, at 526, 65 S.E.2d 575, at 580 (1951).

The Fourth Circuit's result in the present case is particularly untenable in view of the Virginia legislature's specific provision in the Act for compensation awards by the Industrial Commission of Virginia following a compensation award by another jurisdiction. Va. Code § 65.1-61. Certainly, a provision by a state legislature *permitting* successive awards detracts from the prudence of regarding another section as *precluding* the same. It was certainly reasonable for this Court to apply similar reasoning in *Magnolia*. It is no less reasonable for this Court to take notice of the statutory posture of Virginia concerning successive awards. Regardless of whether the *Magnolia* majority's "caveat as to what it was *not* deciding" can be "elevated into a rationale" (Resp. Br. at 40), the provision for successive awards by Virginia is of equal dispositive force in the present case as the preclusion of successive awards by Texas was in *Magnolia*.

Washington Gas Light's response that the Virginia legislature's *imprimatur* on second awards is actually supportive of the Fourth Circuit's result is spurious. Two scenarios demonstrate the possible operation of the Virginia provision. Initially, an employee, whose injury is compensable in both Virginia and a foreign jurisdiction, might receive an award from the foreign jurisdiction *less* than the recovery authorized by Virginia for the same injury. The Virginia Code, § 65.1-61, authorizes the Virginia commission to issue an award which, combined with the claimant's earlier recovery, is equal to the total amount authorized in Virginia. However, as a second alternative, the employee's original award may be *greater* than any potential recovery from Virginia. The Virginia commission, though possessing jurisdiction over the claim, would not issue an award because the claimant's benefits already exceed his authorized remedy in Virginia. Nonetheless, the employee's extrajurisdictional recovery is *not* limited to the maximum benefits allowable in Virginia. Thus, it is abundantly clear that the object of the recovery limitation contained in the Virginia "foreign injuries" section is not to guarantee "that employers' maximum obligations would be determined by that statute." (Resp. Br. at 39).[6]

[6] In support of its position, the employer cites *Gasch* v. *Britton*, 202 F.2d 356 (D.C. Cir. 1953). The Fourth Circuit also relied heavily on *Gasch* in its disposition of *Pettus*. The case is of extremely questionable precedential authority. The *Gasch* decision was predicated upon inferring from a Maryland Court of Appeals decision that the statute's exclusive remedy section was an express prohibition of successive awards. Subsequently, in *Wood* v. *Aetna Casualty Company*, 260 Md. 651, 273 A.2d 125 1971), the Maryland Court of Appeals denied any intention to so hold and therefore upheld the right of a claimant to obtain an extrajurisdictional award subsequent to receipt of compensation in Maryland. Also ignored by the Fourth Circuit was a later D.C. Circuit case upholding a successive award in the absence of an explicit prohibition against seeking additional or alternative relief under the laws of another jurisdiction. *Director, OWCP* v. *Boughman*, 545 F.2d 210 (D.C. Cir. 1976) aff'g *Ekar* v. *Int'l Union of Operating Engineers*, 1 BRBS 406 (1975).

The true purpose of the limitation is to insure against double recovery by granting a credit for compensation previously paid under a less generous statute and preventing any further recovery where compensation has been paid under a more generous statute. By the terms of its Act, Virginia has merely declared that it will not be responsible for contributing to a total recovery that exceeds that authorized by *either* of the applicable compensation statutes.[7] The fact remains that to adopt the employer's suggested interpretation of the Virginia exclusive remedy provision is to hold that Virginia forbids the District of Columbia from exercising the same authority it reserves for itself when the tables are turned.

Finally, to whatever extent there is any doubt as to the proper scope of the Virginia exclusive remedy provision, this Court is reminded that Virginia has determined to construe its compensation statute liberally in favor of the injured employee in order to effectuate its humanitarian purpose. *Barker* v. *Appalachian Power Co.*, 209 Va. 162, 163 S.E.2d 311 (1968). The Supreme Court of Virginia has extended the rule of liberal construction to the provision in controversy. *Griffith* v. *Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942). Partially out of deference to this principle of

[7] Similar provisions are common in most states statutorily recognizing successive awards. 4 A. LARSON, *The Law of Workmen's Compensation*, § 85.40 (1970).

construction, the *McCartin* Court refused to interpret a nearly identical provision "so as to cut off an employee's right to sue under other legislation passed for his benefit" without "unmistakeable language from the state legislature or judiciary." 330 U.S. at 628. The petitioner urges that faithfulness to this rule of construction, without an explicit prohibition by Virginia, compels recognition of the District of Columbia's authority to enforce its own statute.

2. *In the absence of an express statutory declaration*

The employer has sought to characterize Mr. Thomas' rights to compensation in Virginia and the District of Columbia as a single cause of action for which he is entitled but one recovery. Thus, the employer urges, Mr. Thomas may not resort to the District of Columbia Act after signing a workmen's compensation agreement in Virginia. In support of its restrictive view of Mr. Thomas' rights, the employer posits two principal contentions. First, the employer interjects that the grounds for recovery are the same in both jurisdictions, that is, "one jackhammer, one back, one injury." (Resp. Br. at 42). Additionally, the employer contends that Mr. Thomas' position is equivalent to "that of a plaintiff in a tort, wrongful death, or contract action." (Resp. Br. at 42). Unfortunately, the employer's position fails to account for certain peculiarities surrounding traditional workmen's compensation law.

In reality, Mr. Thomas' receipt of benefits pursuant to the memorandum of agreement is a far cry from a cause of action sounding in tort or contract that has been pursued to final judgment. It is true that the full

faith and credit clause was designed to require a plaintiff to try his whole cause of action at one time. However, this purpose presupposes a single cause of action ultimately governed by the dispositive law of a single state to the exclusion of all otners. Also presumed, is a forum with sufficient authority to consider the entirety of the claimant's rights and draw upon all the law bearing directly upon the claim. In the traditional common law action, these conditions are satisfied by the choice of law approach. Regardless of the forum within which the suit is brought, the forum is eventually forced to choose a single dispositive rule from the law of all interested states.

But unlike a common law damages action, a single dispositive law need not be chosen to determine the rights arising from an accidental industrial injury. This Court has long recognized the conflicts in the coverage of workmen's compensation statutes as one of the rare instances in which no choice of law need be made. *Alaska Packers Ass'n* v. *Industrial Accident Commission,* 294 U.S. 532 (1935); *Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 306 U.S. 493 (1939). These decisions have recognized workmen's compensation awards as a distinctive category separate from the ordinary tort or contract action. Both decisions combine to produce the unique circumstance that "more than one state is constitutionally empowered to determine the legal consequences of a single event by the application of its *internal law,* as distinguished from its *conflict of laws rule,* governing the subject." (emphasis added). Wolkin, *Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern,* 92 U.Pa.L.Rev. 401, at 407 (1944).

The decisions in *Alaska Packers* and *Pacific Employers* defy the employer's narrow view of workmen's compensation as a single remedy for a single injury. The thrust of the decisions was that both states may determine the consequences of events which transpire within their borders. Unlike traditional common law and statutory remedies (including wrongful death and survival actions), this Court ruled that one state need not restrain the enforcement of its workmen's compensation statute at the behest of a sister state with a superior interest. Such a circumstance points only to the independence of the two statutes and contradicts a single cause of action theory.

A second salient distinction between the Virginia compensation agreement and an ordinary judgment is the *capacity* of the forum to pick and choose from the laws of competing jurisdictions. As noted above, the forum court in a tort or contract action may select a rule from competing jurisdictions to govern the controversy before it. Thus, the law of all interested jurisdictions is brought to bear upon the claim. Through the application of choice-of-law principles, the entirety of the cause of action may be settled and the interests of each state may be vindicated. In contrast, the Industrial Commission of Virginia is only empowered to decide "questions arising under this Act."[8] Va. Code § 65.1-92. The commission may only pass upon the claimant's rights in Virginia. Mr. Thomas,

[8] The employer's speculation that Virginia's purpose in limiting the jurisdiction of the Industrial Commission was to statutorily predetermine the choice-of-law is improbable. Certainly by the language of § 65.1-92, a much more likely intent was merely to confine the jurisdiction of the administrative body to the area for which it was created and in which its expertise is to be relied upon.

therefore, had no opportunity to litigate his rights under the District's compensation statute.

Despite this unique difference, the employer persists in maintaining that Mr. Thomas may be equated with a plaintiff in a tort or contract action. In support thereof, the employer cites *Semler* v. *Psychiatric Institute,* 575 F.2d 922 (D.C. Cir. 1978) (Resp. Br. at 42), holding that a successful plaintiff in a wrongful death action in Virginia may not prosecute a similar action in the District of Columbia. Yet the District of Columbia Circuit expressly noted that a workmen's compensation claimant differs materially from a wrongful death plaintiff for the precise reason isolated above. 575 F.2d at 929 n. 41. Following its discussion of the impact of *Magnolia* and *McCartin,* the *Semler* Court concluded that:

> "... the central inquiry in determining whether a judgment in the first forum should bar a suit on the same transaction in the second forum is whether plaintiff has had the opportunity to raise the choice of law issue in the first forum."
>
> 575 F.2d at 929 n. 41.

In addition to the choice-of-law pecularities, the employer's brief ignores a further lesson to be learned from the structure of the Virginia compensation system. The provision for supplementation by Virginia of parallel awards authorized by sister states is wholly inconsistent with a reading of Virginia workmen's compensation as a single remedy for a single cause of action. Surely implicit in the Virginia Act, and others of similar construction, is that the right to compensation therein provided does not—in fact, can not—represent a single cause of action equivalent to the right to damages for tort or breach of contract.

Little additional illustration is needed of the difficulty in equating workmen's compensation structure, procedure, and purpose with common law tort actions. Indeed, it is clear that workmen's compensation is a specialized system designed to remedy the inadequacies of traditional tort recoveries for industrial accidents. Compensation is more accurately viewed as a hybrid of tort and public accident insurance. *See generally* 1 A. Larson, *The Law Of Workmen's Compensation*, §§ 1.00-3.40 (1970). As Professor Larson, the most distinguished theoretician in the field of workmen's compensation, summarizes in his celebrated treatise:

> The sum total of these ingredients is a unique system which is neither a branch of tort law nor social insurance of the British or continental type, but which has some of the characteristics of each. Like tort, but unlike social insurance, its operative mechanism is unilateral employer liability, with no contribution by the employee, or state; like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame.
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> 1 A. Larson, *The Law of Workmen's Compensation*, § 1.20 (1970)

This explanation of workmen's compensation statutes is consistent with the particular design of the Virginia Act. The coverage of the Act is mandatory for all employers and employees, excepting those employees who have affirmatively waived its provisions prior to injury. Va. Code, § 65.1-23. In all cases where the employee has not waived coverage, the Act incorporates the terms of the statute into the contract of em-

ployment. Thus, the Supreme Court of Virginia, in *Fauver* v. *Bell*, 192 Va. 518, 65 S.E.2d 575 (1951), was led to comment on the nature and purpose of the Virginia Act:

> A consideration of the objects and purposes of workmen's compensatory legislation and the changes it wrought in the rules of the common law have been clearly and fully stated in many cases coming before this court. The legislation was for the beneficient purpose of providing compensation, *in the nature of insurance,* to a workman or his dependents, in the event of his injury or death . . . The pecuniary loss incident to the payment of the compensation is cast upon the employer as a part of the expenses of his business. (emphasis added) 65 S.E.2d at 577.

For the purpose of this Court's inquiry, Mr. Thomas' Virginia remedy more closely resembles recovery under a state authorized system of insurance against the risks involved in hazardous industrial employment than a cause of action in tort. The right to compensation under the Act is independent of the comparative fault of either party. The system is designed to function expeditiously and without the coercion of formal proceedings. The procedures followed in the instant case,[9] as encouraged by the state, were completely non-adversarial. Hence, as Professor Larson notes, ". . . tort litigation is an adversary contest to right a wrong between the contestants; workmen's compensation is a system, not a contest, to supply security to injured

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[9] The non-adversarial process by which Mr. Thomas received his benefits is quite common. Approximately 95% of all compensation benefits provided in the various states are secured in this manner. *Dillard* v. *Virginia Industrial Commission*, 416 U.S. 783, n. 2 (1974).

workers and distribute the cost to the consumers of the product." 1 A. Larson, *The Law of Workmen's Compensation,* § 2.70 (1970). Viewed in this light, successive awards by interested states authorizing more generous remedies should be encouraged in furtherance of the social policy which prompted the creation of workmen's compensation statutes, rather than restricted under a cumbersome comparison with causes of action sounding in tort or contract.

C. The constitutional obligation of full faith and credit should not be extended to the Virginia agreement so as to bar the District of Columbia award

Mr. Thomas has never disputed the fact that the Virginia agreement, as approved by the Virginia Commission, binds the parties to the terms of the recovery agreed upon as tightly as an adjudicated compensation award. However, the petitioner maintains that the *procedure* by which he secured his benefits is critical to the propriety of using those benefits as a bar to a further District of Columbia recovery—particularly in light of the preceding discussion of the nature and purpose of workmen's compensation. Mr. Thomas urges that, should a conflict be found between the Virginia agreement and the District award, there is room between the lines of the full faith and credit clause of Article Four to recognize the pecularities of the instant case.

Mr. Thomas was never a Virginia litigant. Mr. Thomas never filed a claim in Virginia. The only affirmative action attributable to Mr. Thomas in pursuit of Virginia compensation is his signing of an agreement while flat on his back in the hospital. Such agreements are encouraged as an expeditious, informal means of getting compensation benefits started to temporarily replace the disabled worker's employment income. Va. Code, § 65.1-45. None of the purposes of the full faith and credit clause in ending litigation is served by its application to Mr. Thomas.

Certainly, the means by which Mr. Thomas received compensation distinguishes his position from that of the claimant in *Magnolia.* Hunt, the employee, had pursued an adjudicated claim to a final lump sum award. This Court noted the goal of "the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time." 320 U.S. at 443-44. But to apply the same reasoning to Mr. Thomas would be to ignore reality. Mr. Thomas' position is more akin to that of the claimant in *McCartin* where the procedure used to secure benefits is voluntary, informal and non-adversarial. *See generally,* 4 A. Larson, *The Law of Workmen's Compensation,* § 85.50 (1970).

The purposes of full faith and credit were not advanced by the decision of the Fourth Circuit. Mr. Thomas' signature on the Virginia agreement does not constitute the kind of action which the full faith and credit clause was designed to reach. No provision by Virginia regarding the enforceability of such agreements can change the informality of the *procedure* involved. Simply put, the Virginia agreement, encouraged as an uncomplicated means of guaranteeing prompt relief to the disabled worker, should not be elevated to the level of *res judicata* judgments of a sister state, regardless of the ultimate enforceability of the informal agreement.

CONCLUSION

The Washington Gas Light Company's attempts to avoid the constitutional question must fail. Clearly, under the unambiguous language of the District of Columbia Act, Mr. Thomas' claim was timely filed. Indeed, only literal enforcement of the Act according to its terms satisfies the purposes which prompted the addition of § 30(f) to the Act. Nor can the claim be defeated by resort to the state coverage condition of § 3(a). According to the wisdom of longstanding precedent, the condition limiting coverage under the Longshoremen's Act to injuries not compensable under state law did not transfer to the Act's extension to the District of Columbia.

The ultimate question remains whether the agreement signed by Thomas effected a discharge of all of his rights under the law of his domicile, the District of Columbia. The answer is discovered in the structure of the statutory remedy that Virginia has provided. Of the many factors isolated which bear on this issue, the petitioner chooses to select for emphasis the legislative seal of approval given successive awards in Virginia. This explicit statutory sanction of successive awards is critical to the outcome of the instant case in three respects. First, the provision wholly distinguishes *Magnolia*. Secondly, the provision undermines any barrier to successive awards based on the Virginia exclusive remedy provision. Finally, the provision is logically inconsistent with the employer's contention that workmen's compensation recovery in Virginia is designed to be a single, indivisible cause of action.

Nor should the Court be offended by one state's supplementation of another's award. Compensation

was never designed to be a remedy for a wrong. Coverage is not based on fault. The recovery is not designed to make the claimant whole for his loss. Workmen's compensation simply represents a social policy aimed at insuring an employee against disabling injuries which cause loss of income and the means of support. To the extent that more than one state with a legitimate interest in the accident is willing to authorize compensation, no policy grounded in theory or practice has been advanced which should prevent the claimant's resort to the more generous recovery.

Respectfully submitted,

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